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No. 82 -

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1982

In Re: Fine Paper Antitrust Litigation
MDL 323

STATE OF ALASKA, et al,

Petitioners,

v.

BOISE CASCADE, et al,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN R. ELLIS
Senior Assistant Attorney General
JAMES KIRKHAM JOHNS *
Assistant Attorney General
Office of the Attorney General
1366 Dexter Horton Building
Seattle, Washington 98104
(206) 464-6247

* Counsel of Record

On Behalf Of Petitioners

[Additional Counsel
Listed Inside]

QUESTIONS PRESENTED FOR REVIEW

1. In ruling on the transfer of Petitioners' cases under 28 U.S.C. § 1404(a), were the courts below justified, in light of the mandate of Hoffman v. Blaski, 363 U.S. 335 (1960), in applying the prerequisite language of the statute - which limits the transfer of cases to those districts where the actions "might have been brought" - by considering the situation that existed at the time of transfer, rather than at the time the actions were brought.

2. Did the scheduling of discovery and trial in these multidistrict antitrust cases, pursuant to which Petitioners were, inter alia, 1) allowed only 12.5 months within which to review 1.8 million documents and depose 270 people, 2) required to submit a pretrial

memorandum one week after the discovery cutoff date, with less than half of the deposition transcripts available, 3) required to commence an originally scheduled trial two weeks after the discovery cutoff date, with the deposition transcripts still unavailable, and 4) required to commence a rescheduled trial on one weeks notice, reflect proper regard for the constituent elements of Rule 1, F. R. Civ. P., in light of the demonstrable need for additional time within which to adequately and effectively complete discovery and prepare for trial.

3. Under Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), did the district court err in partially directing a verdict against Petitioners in light of evidence not susceptible to a non-conspiratorial

interpretation which demonstrated the very conspiracy alleged by Petitioners.

4. Did the district court err in excluding evidence of Arkansas purchases as a sanction for Arkansas having relied upon the procedural safeguards of Rule 33(c), F. R. Civ. P., in responding to certain interrogatories by producing responsive documents in lieu of completing thousands of forms submitted with the interrogatories.

5. In ruling on motions for class certification, did the district court err in applying the commonality requirements of Rule 23, F. R. Civ. P., by comparing one class with another class, rather than by comparing the claims of the class representative with the claims of the class.

State of Alaska:
Louise E. Ma, Esq.
Office of the Attorney General
1031 W. 4th Ave., Suite 200
Anchorage, AK 99501
(907) 276-3550

State of Arkansas:
Jeffrey A. Bell, Esq.
Antitrust Division
Office of the Attorney General
Justice Building
Little Rock, AR 972201
(501) 371-1092

State of California:
Patricia A. Cutler, Esq.
Charles M. Kagay, Esq.
Department of Justice
6000 State Office Building
350 McAllister Stree
San Francisco, CA 94102
(415) 557-3651

State of Colorado:
Thomas P. McMahon, Esq.
Office of the Attorney General
Antitrust Unit
Enforcement Section
Department of Law, Third Floor
1525 Sherman Street
Denver, CO 80203
(303) 866-3611

State of Iowa:
John R. Perkins, Esq.
Antitrust Division
Department of Justice
Second Floor
Hoover State Office Building
Des Moines, IA 50319
(515) 281-6701

State of Missouri:
Robert Dolan, Esq.
Office of the Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321

State of Montana:
Jerome J. Cate, Esq.
Antitrust Enforcement Bureau
Office of the Attorney General
State Capitol
Helena, MT 59601
(406) 449-2026

State of Nebraska:
Dale A. Comer, Esq.
Department of Justice
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682

State of Oregon:
Richard L. Caswell, Esq.
Antitrust Division
Department of Justice
235 Union Street, Northeast
Salem, OR 97310
(503) 378-4732

State of Washington:
John R. Ellis, Esq.
James Kirkham Johns, Esq.
Office of the Attorney General
1366 Dexter Horton Building
Seattle, Washington 98104
(206) 464-7744

PARTIES TO THE PROCEEDING

The parties to the proceedings in the court of appeals were as follows:

Plaintiffs/Appellants:

State of Alaska
State of Arkansas
State of California
State of Colorado
State of Iowa
State of Missouri
State of Montana
State of Nebraska
State of Oregon
State of Washington

Defendants/Appellees:

Boise Cascade Corp.
Butler Paper Co.
Champion International Corp.
Crown Zellerbach Corp.
Great Northern Nekoosa Corp.
Hammermill Paper Co.
International Paper Co.
Kimberly-Clark Corp.
The Mead Corp.
Scott Paper Co.
Weyerhaeuser Co.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, the States of Alaska, Arkansas, California, Colorado, Iowa, Missouri, Montana, Nebraska, Oregon and Washington (hereinafter "Petitioners"), respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 16, 1982.

OPINIONS BELOW

The opinion of the court of appeals is reported at 685 F.2d 810 (3d Cir. 1982) and at 1982-2 Trade Cases ¶ 64,843 (3d Cir. 1982). It is reproduced in the appendix annexed hereto at A1-A31.

The rulings and orders of the

district court relevant to this petition are unreported, but are reproduced in the appendix on file with the court of appeals. A true and correct copy of that appendix, certified as such, has been lodged directly with this Court by Petitioners in lieu of initiating the procedures set forth in Supreme Court Rule 19[1]

JURISDICTION

The court of appeals issued its opinion and entered judgment on July 16, 1982. A petition for rehearing was timely filed in accordance with F.R.A.P. 35(b) and 40(a),[2] and was

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1 The lodging of the appendix directly with this Court in lieu of initiating the Rule 19 procedure was recommended by the clerk in order to avoid inconveniencing the court of appeals with transmission of the record.

2 A40-A72.

denied on August 12, 1982.[3]

The jurisdiction of this Court is invoked under 28 U.S.C. § § 1254(1) and 2101(c), and Supreme Court Rule 20.4.

STATUTES AND RULES INVOLVED

The following statutes and rules are relevant to this petition:

28 U.S.C. § 1404(a):

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1407(a):

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this

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3 A73.

section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

Federal Rules Of Civil Procedure, Rule 1:

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action.

Federal Rules Of Civil Procedure, Rule 33(c):

Where the answer to an

interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.[4]

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4 The last sentence of Rule 33(c) was added as part of the 1980 amendments to the Federal Rules, effective August 1, 1980.

STATEMENT OF THE CASE

These multidistrict antitrust cases were filed by Petitioners in their respective home districts in early 1978, and were subsequently transferred to the Eastern District of Pennsylvania under 28 U.S.C. § 1407 for coordinated pretrial proceedings with other state and private cases.[5] Jurisdiction of the district courts was invoked under 28 U.S.C. § 1337 and 15 U.S.C. § 15.

The cases alleged a price fixing conspiracy among manufacturers of printing and writing paper ("fine paper"), referred to as mills, and certain distributors, referred to as merchants. One group of plaintiffs, comprised of private plaintiffs and nine states, alleged a conspiracy among

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5 In re Fine Paper Antitrust Litigation, 446 F.Supp. 759 (JPML 1978).

defendant mills[6] and certain merchants which were subsidiaries or divisions of defendant mills.[7] The plaintiffs within this group were referred to below as the Class Plaintiffs or the Certified Plaintiffs.[8] The other group of plaintiffs, including Petitioners herein, alleged a conspiracy among the same mills and mill-affiliated merchants, and, in addition, certain independent merchants.[9]

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6 Respondents herein, and Potlatch Corporation, St. Regis Paper Company, Union Camp Corp., Wausau Paper Mills Company, and Westvaco Corp.

7 Butler Paper Company (Great Northern Nekoosa); J.C. Paper Company (Wausau); Seaboard Paper Company (Mead); Nationwide Paper Company (Champion International); Zellerbach Paper Company (Crown Zellerbach); and Western Paper Company (Hammermill).

8 The nine states included in the group of Certified Plaintiffs were generally referred to below as the Minority States.

9 Blake, Moffitt & Towne; Carpenter/Offutt Paper Company; Dixon Paper Company; Graham Paper Company; Noland Paper Company; and Ingram Paper Company.

The plaintiffs in this group were referred to below as the Majority States. The various defendants were referred to, respectively, as the Mill Defendants, the Merchant Defendants, and the Independent Merchant Defendants.

Petitioners' cases were the only Fine Paper cases that did not fully settle prior to trial.[10] At the conclusion of pretrial proceedings, Petitioners' cases were transferred to the Eastern District of Pennsylvania under 28 U.S.C. § 1404(a) and consolidated for trial. Trial commenced on October 9, 1980, and the jury returned a verdict in favor of respondents on December 2, 1980.

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10 Prior to the commencement of trial, Petitioners entered into settlement agreements with the Independent Merchant Defendants. Shortly after the commencement of trial, Petitioners settled with the mill defendants other than Respondents herein.

A. The Scheduling Of Discovery And Trial

Discovery on the merits was stayed during the class certification proceedings, i.e., until February 16, 1979.[11] During a pretrial conference on March 7, 1979, called for the purpose of setting guidelines for discovery,[12] The district court set an initial trial date of January 2, 1980. That setting was not based on any knowledgeable or specific projections of the amount and nature of discovery necessary, or the period within which that discovery could reasonably be accomplished.[13]

The January 2 setting was adhered to six and a half months later during a conference on September 27, 1979, when informed projections of the time needed

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11 Court of Appeals Appendix pp. (hereinafter "C/A App. pp.") 37-38 and 863-866.

12 C/A App. p. 872-1.

13 C/A App. pp. 872-886.

for discovery were available in light of the five and a half months of discovery (primarily the request, production and review of documents) which had been conducted as of that date. Plaintiffs' counsel informed the court at that time of the need to extend the trial date, due to the number of depositions plaintiffs anticipated having to take.[14] The district court adhered to the original trial setting, expressing concern over being a "roundheel" on the trial date.[15]

Two months later, on December 4, 1979, the Certified Plaintiffs stated that they would need until "the fall" to complete depositions and prepare for trial. The district court gave the Certified Plaintiffs a September trial date. At the same time, however, the court expressed its intention to

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14 C/A App. pp. 919-928.
15 C/A App. pp. 1031-1--1031-2.

"separate out" the independent merchant portion of Petitioners' cases for a separate trial in April.[16] In a follow-up conference two weeks later, on December 20, 1979, the court set September 22, 1980 as the specific date of the Certified Plaintiffs' trial, and established July 3, 1980 as the discovery cutoff date.[17]

Three and a half weeks later, on January 15, 1980, the district court set an earlier discovery cutoff date of May 30, scheduled trial of Petitioners' cases for June 16, i.e., two weeks after the close of discovery, and required the filing of Petitioners' pretrial

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16 C/A App. pp. 1107-1116; 1142-1147; 1164-1169; 1266-1267; 1284; 1480. Petitioners later prevailed upon the court to abandon the notion of "separating out" the independent merchant involvement in the conspiracy for a separate trial. C/A App. pp. 1262-1290.

17 C/A App. pp. 1140-1141; 1172; 1179-1180; 1187.

memorandum on June 6, i.e., one week after the close of discovery.[18] That schedule was established over Petitioners' strenuous objection that any discovery cutoff date prior to July would severely prejudice their ability to efficiently and effectively complete a meaningful discovery program and prepare their cases for trial. In so objecting, Petitioners' detailed their discovery efforts since the lifting of the stay on merits discovery,[19] i.e., that 750,000 documents had been reviewed within the preceding six months; that an additional 300,000 documents had yet to be reviewed; that the production of documents by certain defendants had not yet even been completed; and that, conservatively speaking, in excess of 100 depositions

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18 C/A App. pp. 1233-1236.

19 C/A App. pp. 1233-1236; 1262-1290; 1566-1568; 1572-1574; 1576-1580; 1597-1606.

appeared necessary.[20]

Petitioners moved for reconsideration of the scheduling orders,[21] and in doing so, presented the district court with affidavits of counsel which set forth in great detail and with unusual candor Petitioners' successive efforts to adhere to the court's schedule for discovery and trial preparation, the amount and nature of discovery accomplished and remaining, and the need for additional time within which to complete the discovery in an orderly, efficient and meaningful way and prepare for trial.[22] The details provided included the fact that in excess of 1.5 million documents had been produced by

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20 In fact, over 270 depositions were taken within the five months available under the district court's schedule.

21 C/A App. pp. 1493-1499; 1291-1476; and 1477-1492.

22 C/A App. pp. 1299-1310; 1480-1485; and 1524.

defendants (over 400,000 of which had been produced during the preceding three month period); that over 900,000 of those documents had been reviewed to date; that reasonable projections (the basis for which were set forth in detail) indicated the need for 168 depositions, involving a total of 252 days of deposition testimony, and requiring three months to 11.5 months to complete, depending upon the number of depositions taken simultaneously;[23] and the fact that additional time would be needed after the close of discovery for the review, analysis and assimilation of discovery information, the development of damage analyses and damage studies, proper consideration of the place, nature and scope of trial, the preparation of

23 The effort to complete depositions within the time allowed resulted in as many as fifteen depositions being taken simultaneously on a single day.

pretrial memoranda, and attendance to myriad trial preparation matters to assure efficiency at trial, such as the designation of testimony and the resolution of disputes regarding admissibility of evidence.[24] The motion was denied.[25]

One week after the close of discovery, Petitioners submitted their pretrial memorandum,[26] as required, although less than half of the deposition transcripts had been received from the district court's reporter,[27] who had reported the depositions on an expedited basis. The following week, Petitioners'

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24 See, Manual For Complex Litigation, 1977 Edition.) § § 4.20, 4.21, 4.211, 4.22, 4.221.

25 C/A App. p. 1524.

26 The memorandum was 200 pages in length and contained, inter alia, 63 separate contention paragraphs, each of which was annotated to deposition testimony and exhibits supporting the contention.

27 C/A App. pp. 2046-2047; 2061-1063.

trial staff moved to Philadelphia and established a functioning trial office, anticipating having to commence with trial, as scheduled, on June 16. The trial did not commence on that date.[28] With reference only to Petitioners' "unacceptable" trial memorandum,[29] rather than the unavailability of half of the deposition transcripts, the district court cancelled the trial date, required Petitioners to submit a second pretrial memorandum by July 25, and tentatively scheduled Petitioners' cases for trial "with or after" the trial of the

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28 Curiously, Petitioners were the only parties who readied themselves to proceed with trial on that date. Notwithstanding Petitioners' repeated efforts over the prceding six months to obtain extensions of the schedule, the district court adhered to the June 16 trial date. In this context, it is singularly worth noting that defendants' counsel appeared at the "final" pretrial conference with overnight bags in hand. C/A App. pp. 4987-4989.

29 C/A App. pp. 2035-2067.

Certified Plaintiffs in September.[30]

Petitioners second pretrial memorandum was filed on July 25.[31] Because evidence was still unavailable at that time,[32] petitioners informed the court that the memorandum, already 1200 pages in length, would be supplemented when the additional evidence became available. In response, the district court immediately granted Respondents' request for leave to defer the filing of their pretrial memoranda,[33] with the result that Petitioners did not receive

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30 C/A App. pp. 2092-2093.

31 C/A App. pp. 2203-3447.

32 Notwithstanding the district court's representation during the June 16 conference that his reporter would have all deposition transcripts completed by June 25, one month before the brief was due, Petitioners had not received transcripts or exhibits for 16 depositions by July 25, and had not received transcripts and/or exhibits for 39 other depositions in time to be included in their memorandum. C/A App. pp. 4977-4979.

33 C/A App. pp. 4980-4981; 4984-4986.

those memoranda until the night before trial.

On July 30, the district court informed Petitioners by letter that their cases would not be consolidated with the cases of the Certified Plaintiffs for trial on September 22, and that a trial date for their cases would "be determined at a later date."[34]

It was. On September 25, 1980, immediately upon settlement of the Certified Plaintiffs' cases, the district court scheduled, on four days notice, a pretrial conference for September 29, and trial on October 6. [35] During the September 29 conference, Petitioners requested an additional two weeks before trial in light of the logistical difficulties presented by such short notice, such as arranging for living

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34 C/A App. pp. 4985-4986.
35 C/A App. pp. 3885-3897; 3965.

accommodations and a functioning trial office, packing, shipping and unpacking files and records, and rescheduling other litigation commitments.[36] Petitioners also emphasized the numerous advantages of attending to the myriad pretrial matters that would facilitate an orderly presentation at trial, such as designations of testimony, evidentiary objections and rulings, etc.,[37] all of which Petitioners were precluded from previously attending to inasmuch as Respondents and the Certified Plaintiffs were preparing for their trial on September 22.

Following a final pretrial conference on October 6, 1980, and jury selection on October 7 and 8, trial commenced on October 9, 1980. After

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36 C/A App. pp. 3885-3908; 3968-3972.

37 C/A App. pp. 3885-3886; 3905; 3968-3972.

several days of deliberation, the jury returned a verdict in favor of Respondents on December 2, 1980.

B. The Transfer Of Petitioners' Cases To The Eastern District of Pennsylvania For Trial

In January, 1980, the district court ordered all parties who opposed venue in the Eastern District of Pennsylvania for purposes of trial to file objections to such venue.[38] Petitioners objected[39] on the grounds that the Eastern District of Pennsylvania was not a forum in which their cases could have been brought, inasmuch as venue in that district would not have been proper with respect to the Independent Merchants named in their cases.[40] Respondents conceded the

38 C/A App. pp. 1234-1236; 1566-1610.

39 C/A App. pp. 1240-1257; 1506-1508; 1509-1523; 1537-1542; 1551-1565.

40 Blake, Moffitt & Towne, named as a

impropriety of venue in that district as to those defendants.[41]

Moreover, Merchant Defendant Butler Paper Company (an affiliate of Great Northern Nekoosa) objected to venue in the Eastern District of Pennsylvania.[42]

Notwithstanding these objections, and without findings thereon, the district court transferred Petitioners' cases to the Eastern District of Pennsylvania under 28 U.S.C. § 1404(a) upon the completion of coordinated pretrial proceedings, and consolidated the cases for trial under Rule 42(a),

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defendant by Alaska, California, Oregon and Washington (C/A App. pp. 324-334; 364-376; 268-279; 335-348); Carpenter/Offutt Paper Company, named as a defendant by California, Oregon and Washington; Dixon Paper Company, named as a defendant by Colorado (C/A App. pp. 191-202); and Noland Paper Company and Ingram Paper Company, named as defendants by California (C/A App. pp. 364-376).

41 C/A App. pp. 1509-1523.

42 C/A App. pp. 1258-1261; 1537-1542.

Federal Rules of Civil Procedure.[43]

C. Exclusion Of Evidence And Partial Directed Virdict Regarding Merchant House Involvement In The Conspiracy

Petitioners alleged with specificity, both in their complaints and in their pretrial memoranda, a single conspiracy operating at both the mill level and the merchant level, and involving as conspirators certain mills, mill-affiliated merchants, and certain independent merchants.[44] It was that conspiracy upon which evidence was

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43 C/A App. pp. 3448-3449. There is no support for the circuit court's statement that the district court "specifically found" that venue as to Butler was proper. A22, n.6. The record reflects simply the fact of transfer.

44 These allegations were set forth in Petitioners' complaints (C/A App. pp. 116, 197, 211, 222, 254, 274, 331, 342-343, and 371) and in their pretrial memorandum (C/A App. pp. 2467, 2484, 2491, 2563, 2511, 2540, 2552, 2563, 2571, 2578, 2582, and 2585).

offered at trial.

That evidence included correspondence between a mill-owned merchant, J.C. Paper Company, and its parent mill, Wausau Paper Mills Company, regarding an agreement between five mill-owned merchants[45] and two independent merchants[46] to eliminate price discounting. The letter[47] stated as follows:[48]

. . .

Dear Folke:

. . .

The market place is trying very hard to go to bracket pricing in the book [i.e., adherence to quantity prices published in price books]. [Independent Merchant Defendant] Blake has gone to it.

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45 Butler Paper Company (Great Northern Nekoosa), J.C. Paper Company (Wausau), Nationwide Paper Company (Champion International), Seaboard Paper Company (Mead) and Zellerbach Paper Company (Crown Zellerbach).

46 Blake, Moffitt & Towne and Carpenter/Offutt.

47 Plaintiffs' Exhibit 560; C/A App. pp. 4966.

48 Explanations and identifications have been included in brackets for the Court's edification.

[Independent Merchant Defendant] Carpenter Offutt has gone to it. [Merchant Defendant] Nationwide has agreed to it. [Merchant Defendant] Butler has agreed to it. [Merchant Defendant] Seaboard has agreed to it. We feel that [Merchant Defendant] Zellerbach will also go along with the bracket pricing.

It looks very, very promising that the market will firm and bracket pricing will prevail. . . .

. . .

Yours truly,

J.C. Paper Company, Inc.
Wilbur P. Clarke

P.S. I just received a phone call from [Merchant Defendant] Zellerbach saying that they made their announcement today on bracket pricing across the board. It really looks promising, Folke.

The evidence offered at trial also included price announcements from each of those defendants establishing that they did in fact go to firm bracket pricing around April of 1973, pursuant to the agreement reflected in Exhibit 560.[49]

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49 Exhibits 303 (Butler, C/A App. p. 4783); 364 (Carpenter/Offutt, C/A App. p. 4460), 365 (Carpenter/Offutt, C/A App. p. 4861), 366 (Butler, C/A App. p.

The evidence also included the virtually identical "mark-up" schedules used by three of those mill-owned merchants and two of those independent merchants to compute retail prices.[50]

Concluding that such evidence did not reveal the involvement of Mill Defendants, mill-affiliated Merchant Defendants and Independent Merchant Defendants in a single conspiracy operating at both the mill and merchant

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4863), 367 (Seaboard, C/A App. p. 4864), 368 (Zellerbach, C/A App. p. 4865), 369 (Nationwide, C/A App. p. 4866), 370 (J.C. Paper, C/A App. p. 4867), 371 (Noland, C/A App. p. 4868), 373 (Zellerbach, C/A App. p. 4871), and 379 (Blake, Moffitt & Towne, C/A App. p. 4885).

50 Exhibits 358, 359, 374, 375, and 376 (Blake Moffit & Towne), C/A App. pp. 4852, 4856, 5872, 4875, and 4879; Exhibits 551 and 552 (Butler Paper Company), C/A App. pp. 4950 and 4959; Exhibit 309 (Carpenter/Offutt), C/A App. p. 4790; Exhibit 137 (Seaboard), C/A App. p. 4707; Exhibits 342, 355, 356, 357 and 549 (Zellerbach Paper Company), C/A App. pp. 4823, 4834, 4837, 4846, and 4949.

levels, the district court partially granted Respondents' motion for a directed verdict by excluding the above evidence from the jury. [51]

D. Exclusion Of Arkansas Purchase Evidence As A Result Of Arkansas' Reliance Upon Rule 33(c) In Responding To Certain Interrogatories

In September, 1979, certain Mill Defendants[52] served interrogatories on Petitioners.[53] Four of the interrogatories directed Petitioners to complete multi-page forms by typing upon the forms detailed transactional (purchase) data with respect to every purchase of fine paper over a nine year period.[54] For each such purchase

51 C/A App. p. 4499.

52 Boise Cascade Corporation, International Paper Company, Potlatch Corporation, St. Regis Paper Company, Union Camp Corporation, and Weyerhaeuser Corporation.

53 C/A App. pp. 1010-1031.

transaction, eight pages of forms, requiring a minimum of 43 separate entries, were required.

Petitioners responded by invoking the option of Rule 33(c), Federal Rules of Civil Procedure, and producing responsive documents containing the information in lieu of providing a narrative answer, which in this context would have meant completing thousands of forms. [55] Petitioners also referred to their previous responses to defendants' earlier discovery requests, pursuant to which the very documents containing the information elicited by the forms interrogatories had been previously specified, produced, and made available to or copied by defendants. [56]

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54 C/A App. pp. 1018; 1022-1029.

55 C/A App. pp. 1038-1050; 1088-1093; 1051-1056; 1068-1073; 1074-1082; 1100-1106; 1094-1099; 1032-1037; 1057-1067; 1083-1087.

56 C/A App. pp. 706-720; 230-235; 387-401; 236-235 and 446-447;

In December, 1979, the propounding defendants moved to compel Petitioners to complete the forms.[57] The district court granted the motion, and required Petitioners to specifically set forth the information requested.[58] Petitioners moved for reconsideration of the order on the grounds that the order nullified the option expressly provided by the rule, precisely for interrogatories such as those in issue, thereby subverting the intent and purpose of the Rule. Exhibits accompanying the motion for reconsideration included affidavits of counsel attesting to the expense and burden imposed by the requirement that Petitioners complete the forms, and stating that the burden of doing so would be no greater for the defendants than for

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124-131 and 590; 259-264; 721-740; 203-204; 280-294; and 451-468.

57 C/A App. pp. 1117-1139; 1192-1222; 1225-1232.

58 C/A App. pp. 1237-1239.

Petitioners.[59] The motion for reconsideration was denied.[60]

Petitioners then initiated mandamus proceedings,[61] during the pendency of which Petitioners stood on their previous Rule 33(c) responses.[62] During that period, respondents moved twice for sanctions, and the court on both

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59 C/A App. pp. 1311-1476. For example, the affidavit filed by Oregon estimated that extraction of the information would require 5,000 hours and cost $22,000.

60 C/A App. p. 1524.

61 Petitioners petitioned the court of appeals for a writ of mandamus and an emergency stay, both of which were denied. (Third Circuit No. 80-1360). Petitioners then petitioned this Court for a writ of mandamus and a stay of the order. (Supreme Court No. 79-1527). This court denied the motion for stay, but requested a response to the petition from defendants, notwithstanding their earlier waiver of the opportunity to file a brief. The petition was subsequently denied on October 6, 1980. Alaska, et al. v. McGlynn, 449 U.S. 815 (1980).

62 California and Nebraska, however, undertook to respond to the interrogatories. C/A App. pp. 1639-1643; 1668-1671; and 1735-1740.

occasions deferred the matter until the introduction of evidence at trial.[63]

As Petitioners were submitting stipulations regarding purchases by Arkansas at trial,[64] the district court inquired whether Arkansas had completed the forms. When informed that Arkansas had not done so, the court excluded its purchase evidence.[65]

E. Denial of Petitioners' Motions For Class Certification

Petitioners moved to maintain each of their actions as a class action on behalf of their respective governmental entities.[66] The district court denied

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63 C/A App. pp. 1543-1550; 1632-1635; 1636-1638; 1647-1656; 1685-1734; and 3879-1884.

64 C/A App. pp. 4550-4551.

65 C/A App. p. 4551. Only Arkansas was precluded from introducing evidence of purchases at trial. The district court applied its ruling to none of the other states, nor, conspicuously, did Respondents request that it do so.

these motions, but at the same time, granted the motions of the other states and the private plaintiffs.[67]

REASONS FOR GRANTING THE WRIT

A. Transfer Of Petitioners' Cases To The Eastern District Of Pennsylvania For Trial Under § 1404(a) Violated This Court's Mandate In Hoffman v. Blaski

The court of appeal's decision[68] directly conflicts with Hoffman v. Blaski, 363 U.S. 335 (1960). This Court therein interpreted § 1404(a), which provides that:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have

66 C/A App. pp. 132-138; 377-378, 381-386; 429-430, 438-445; 580-581, 586-589; 591-592, 597-600.

67 C/A App. pp. 863-866; 897-918.

68 A20-A22.

been brought. (Emphasis added).

Hoffman held that the prerequisite language of § 1404(a) - which restricts the transfer of an action to those districts "where it might have been brought" - relates to the time an action is brought, not to the time of transfer. 363 U.S. at 342-343. The circuit court, however, reversed the mandate of Hoffman, and held that the threshold requirement of § 1404(a) relates to the facts existing at the time transfer is requested, and, as a result, to those parties who then happen to be before the court. in the action. The circuit court decision thus conflicts with Hoffman, with its own previous decision in Shutte v. Armco Steel Corporation, 431 F.2d 22 (3rd Cir. 1970), and with numerous district court decisions routinely construing the prerequisite language of §

1404(a) in light of Hoffman, and holding that the limiting language of that section relates to the time an action is orginally brought, and to the situation existing at that time.[69]

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69 Intern. Patent Development v. Wyomont Partners, 489 F.Supp. 226 (D. Nev. 1980); American Standard, Inc. v. Bendix Corp., 437 F.Supp. 254 (W.D. Mo. 1980); Schreiber v. Allis-Chalmers Corp., 448 F.Supp. 1079 (D. Kan. 1978); Parker-Hannifin Corp. v. Samuel Moore & Co., 436 F.Supp. 498 (N.D. Ohio 1977); Umbriac v. American Snacks, Inc., 388 F.Supp. 265 (E.D. Pa. 1975); Siemens Aktiengesellschaft v. Sonotone Corporation, 370 F.Supp. 970 (N.D. Ill. 1973); Polin v. Conductron Corporation, 340 F.Supp. 602 (E.D. Pa. 1972); Brotherhood of Locomotive Fire. & Eng. v. Reading Company, 279 F.Supp. 948 (E.D. Pa. 1968); Silver v. Goodman, 234 F.Supp. 415 (D. Conn. 1964); Pan American Bank of Miami v. Gully, 220 F.Supp. 405 (W.D. Pa. 1963). But, c.f., Hess Oil Virgin Islands Corp. v. UOP, Inc., 447 F.Supp. 381 (N.D. Okla. 1978), the only decision cited by the circuit court in support of its holding. Hess, however, merely "assumed" that the threshold requirement of § 1404(a) had been met for the purpose of balancing the respective interests of the parties

The fact that Petitioners had entered into settlement agreements with the Independent Merchant Defendants at the time of transfer was irrelevant to the proper application of § 1404(a). The requirements of § 1404(a) are "unambiguous, direct [and] clear," and the "unequivocal words" of that section, and the legislative history thereto, "establish that Congress indeed meant what it said." 363 U.S. at 343. The requirements are not vague principles to be given liberal construction and application. Olberding v. Illinois Central R. Co., 346 U.S. 338, 340 (1953); De La Fuente v. ICC, 451 F.Supp. 867 (N.D. Ill. 1978).[70] The

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and ruling on the motion for transfer, which was ultimately denied. Thus, Hess stands, at best, as uncertain authority for the circuit court's marked departure from the mandate of Hoffman.

70 For examples of the strict application of the prerequisite language of § 1404(a) in light of

prerequisite language does not mean "where it might have been brought now," i.e., at the time of transfer, against those defendants who then happen to be before the court. The court of appeals was not at liberty to focus their attention on the time of transfer, and to disregard the impropriety of venue in the Eastern District of Pennsylvania as to the Independent Merchants simply because those defendants had tentatively settled[71] with Petitioners at that time.[72]

Hoffman, see, e.g., Brotherhood of Locomotive Firemen; and Hughes v. S.S. Santa Irene, 209 F.Supp. 440 (S.D.N.Y. 1962). The prerequisite language of § 1404(a) relates to the time an action is brought, not to the time of transfer. Hoffman directs a court's attention to the situation existing at that time, including all of the parties-defendant who were then before the court.[[See Ackert v. Ausman, 198 F.Supp. 538, 542 (S.D.N.Y. 1961).

71 C/A App. pp. 7137-7138.

72 The court of appeals affirmed (A22) the district court's order regarding

The Hoffman mandate simply reflects what a proper application of § 1404(a) requires - constancy and finality, resulting from reference to a specific and unalterable situation existing at a single point in time. The court of appeals' decision, on the other hand, permits the prerequisite language of § 1404(a) to be applied with reference to various situations existing at various times throughout the course of litigation. By thus imbuing the prerequisite language with chameleon-like characteristics, the decision transforms venue under § 1404(a) into a moving target, subject to the uncertainties of

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venue as to Butler Paper Company on the basis of a Weyerhaeuser affidavit presented to demonstrate that Butler transacted business in the Eastern District. The court of appeals, however, ignored entirely the responsive affidavit from Butler, which established that Butler transacted no business whatsoever in the Eastern District. C/A App. pp. 1537-1542.

dismissals, settlements and interlocutory judgments which frequently and inevitably change the number and identity of defendants, particularly in the context of multi-party antitrust, securities and derivative actions. Moreover, to subject a plaintiff's venue rights to such shifting standards will have a profound chilling effect upon settlements, which in other respects are judicially encouraged as a matter of public policy. Plaintiffs will be singularly disinclined to settle with defendants if, in doing so, they will jeopardize their choice of forum, and subject their case to the uncertainties of new venue considerations.

The fact that these cases had previously been transferred to the Eastern District of Pennsylvania for coordinated pretrial proceedings under 28 U.S.C. § 1407 in no way qualifies the

prerequisite language of § 1404(a) or the mandate of Hoffman.[73] Under § 1407, actions are transferred to a single district for pretrial proceedings only,[74] at the conclusion of which the actions "shall" be remanded to the districts in which they were filed,[75] unless properly transferred under § 1404(a).[76] Transfers under § 1404(a) by a transferee court, however, are proper only to the extent that the threshold requirements of that section have been met.[77] If the

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73 See, e.g., In re Nissan Motor Corp. Antitrust Litigation, 471 F.Supp. 754, 759 (S.D. Fla. 1979); In re Oil Spill by "Amoco Cadiz" Off Coast of France, 491 F.Supp. 161, 166 (N.D. Ill. 1979).

74 See, e.g., In re Dept. of Energy Stripper Well Exemption, 472 F.Supp. 1282, 1286 (JPML 1979).

75 See, e.g., In re Air Crash Disaster Near Chicago, Etc., 476 F.Supp. 445 (JPML 1979).

76 See Air Disaster at John F. Kennedy, 479 F.Supp. 1118, 1121-1122, (E.D.N.Y. 1978).

77 See, Greyhound Computer, 342 F.Supp. at 1145; Antibiotic Antitrust Actions, 333 F.Supp. at 303.

prerequisite language of § 1404(a) precludes transfer under that section, remand under § 1407 is required.[78] The mandatory remand provisions of § 1407 simply reflect due regard for a plaintiff's choice of forum.[79]

As a practical matter, the need for remand of separate actions to their home districts upon the completion of coordinated pretrial proceedings is seldom necessary. Remand is generally obviated by global settlements or other pre-trial terminations, or by proper transfers under § 1404(a) when the prerequisites of that section have been satisfied.[80] However, when the

78 See Career Academy Antitrust Litigation, 57 F.R.D. at 571.

79 See Philadelphia v. Emhart, 317 F.Supp. at 1323; L.C. O'Neil Truck Limited v. Pacific Car & Foundary, 278 F.Supp. 839, 843 (D. Ha. 1967).

80 Air Crash Disaster Near Chicago, 476 F.Supp. at 450; Career Academy Antitrust Litigation, 57 F.R.D. at 571; and Wiegel, The Judicial Panel

prerequisites have not been met, transfers thereunder are not proper, and remand is necessary.

Moreover, the impact of multiple remands upon the respective home districts can be ameliorated, if not eliminated entirely, by proper regard for, and use of, a district court's ability to stay proceedings on its calendar in light of related litigation pending elsewhere,[81] the effect of collateral estoppel upon subsequent trials and settlement,[82] and the ability

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on Multidistrict Litigation, Transferor Courts and Transferee Courts, 79 F.R.D. 575, 583 (1978).

81 See Cessna Aircraft Company v. Brown, 348 F.2d 689 (10th Cir. 1965); Brotherhood of Locomotive Firemen, 279 F.Supp. 948 (E.D. Pa. 1968); Levin, 289 F.Supp. at 359; and Foster Wheeler Corporation v. Aqua-Chem, Inc., 277 F.Supp. 382, 385 (E.D. Pa. 1967).

82 See, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-333 (1979); Nissan Motor Corp., 471 F.Supp. 754 (S.D. Fla. 1979); and In re Disposable Diaper Patent

of a transferee judge familiar with the litigation to obtain an inter-circuit transfer for the purpose of presiding at trial in another district.[83] Indeed, in this proceeding, Petitioners presented the district court with an opportunity to avoid remanding their cases to their respective home districts. In response to the district court's transfer of their cases to the Eastern District of Pennsylvania, sua sponte,[84] Petitioners moved in the alternative for the transfer of all cases to the Northern District of California - the State of California's home district.[85] Unlike the transfer to the Eastern District of Pennsylvania,

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Validity Litigation, 362 F.Supp. 567, 568 (JPML 1973).

83 See In re Viatron Computer Systems Corp. Litigation, 86 F.R.D. 431, 432 (D. Mass. 1980); and Air Crash Disaster Near Chicago, 476 F.Supp. at 449-450.

84 C/A App. pp. 1234-1236; 1566-1610.

85 C/A App. pp. 1795-1800; 1801-1811.

transfer to the Northern District of California would have been entirely proper, inasmuch as that district was a district in which each of the cases, as and when filed, "might have been brought."[86]

B. THE SCHEDULING OF DISCOVERY AND TRIAL VIOLATED THE FUNDAMENTAL PRECEPTS OF RULE 1, F. R. CIV. P.

The schedule of discovery and trial preparation imposed upon Petitioners by the district court, and the insensitive and rigid manner in which that schedule was formulated and adhered to, constituted a major departure from the conduct of judicial proceedings contemplated by Rule 1 of the Federal

86 The court of appeal's allusion to concerns for judicial efficiency ignores the availability of the Northern District of California as a proper forum for a single trial, and the fact that the district judge could have presided over a single trial in that district. A22.

Rules of Civil Procedure, which requires the "just, speedy, and inexpensive determination of every action." That schedule, and the circuit court's affirming decision,[87] focused on but one of the constituent elements of the rule - speed. The coordinate requirements of the rule - that proceedings thereunder be "just" - was all but forgotten.

The inordinate emphasis upon speed as an end in itself is reflected by the fact that the district court:

1. Established an initial trial date that allowed only ten months for the completion of discovery and trial preparation in a major multi-party, multidistrict antitrust case, and did so

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87 Apparently based, in large part, on the author's view that "to prove a prima facie case of conspiracy, or some other horizontal or vertical restraint, a few dozen invoices - or perhaps a hundred - would suffice." Aldisert, The Role Of The Courts In Contemporary Society, 38 U. Pitt. L.Rev. 437, 469 (1977).

in a total vacuum, at a time when none of the considerations relevant to the establishment of a trial date - the amount and complexity of discovery required, and the time necessary to efficiently and effectively complete that discovery and prepare for trial - were susceptible to sufficiently informed, specific and realistic projections;

2. Rigidly adhered to that initial schedule, even as discovery progressed, and more detailed and realistic projections became available, and were presented to the court with candor and specificity;

3. Ultimately allowed a period of only 12.5 months within which to review 1.8 million documents and depose 270 people;

4. Scheduled the submission of a detailed pretrial memorandum one week after the close of discovery, and the

commencement of trial one week later;

5. Required Petitioners' trial staff to travel to Philadelphia and establish a functioning trial office for a trial beginning only two weeks after the close of discovery before recognizing the obvious and continuing the trial; and in doing so, attributing the need for such rescheduling to Petitioners' "unacceptable" trial memorandum, rather than to the inevitable unavailability of deposition transcripts resulting from the court's failure to adopt an appropriate schedule for discovery and trial preparation;

6. Upon the filing of Petitioners' 1200 page second pretrial memorandum, immediately granted, without notice and hearing, Respondents' request to be relieved from having to file their pretrial memoranda, simply because Petitioners intended to supplement their

memorandum with additional evidence which remained unavailable at the time the memorandum was submitted, with the result that Petitioners did not receive Respondents' trial memoranda until the night before trial;

7. Informed Petitioners on July 30, 1980, that their cases would not be consolidated with the cases of the Certified Plaintiffs for trial on September 22, and that a trial date for Petitioners' cases would be "determined at a later date," and then, immediately upon settlement of the Certified Plaintiffs' cases, scheduled, on 4 days notice, a pretrial conference with Petitioners, and the commencement of trial one week later.

The schedule imposed by the district court was characteristic of Procrustes and Sisyphus, not of the procedures contemplated by Rule 1. The rules do not

require that fair, adequate and orderly discovery and trial preparation be sacrificed to speed as a result of a court's zeal to dispose of pending litigation.[88] "Efficiency is not an end in itself. It has as its objective the very purpose of the whole system - to do justice."[89] In the absence of procrastination, bad planning, lack of diligence or bad faith on counsel's part, all of which were demonstrably absent from this proceeding, it is an abuse of

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88 Winston v. Prudential Lines, 415 F.2d 619, 621 (2nd Cir. 1969); Freehill v. Lewis, 355 F.2d 46, 48 (4th Cir. 1966); and Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926, 931 (3rd Cir. 1950).

89 Burger, Agenda For 2,000 AD - A Need For Systematic Anticipation, 70 F.R.D. 83, 92 (1976) (Keynote address at the National Conference On The Cause Of Popular Dissatisfaction With The Administration Of Justice, St. Paul, Minnesota, April, 1976). See also, Aetna Casualty & Surety Co. v. S/S Green Bay, 307 F.Supp. 72, 74 (E.D. La. 1969).

discretion to deny a fair and adequate opportunity for orderly and effective discovery and trial preparation.[90]

Accomplishment of the objectives of Rule 1 requires weighing the respective elements of the rule and maintaining an even balance. C.f., Landis v. North American Company, 299 U.S. 248, 254-255 (1936). A district court's failure to strike a proper balance between the constituent elements of Rule 1 in a fair, informed and sensitive manner, displaying the requisite degree of flexibility in reevaluating and redetermining discovery and trial preparation schedules as necessary,[91] constitutes an abdication

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90 Gaspar v. Kassm, 493 F.2d 964, 969 (3rd Cir. 1974); Eli Lilly and Company v. Generix, 460 F.2d 1096, 1105 (5th Cir. 1972); Freehill, 355 F.2d at 48; Thermo King Corporation v. White's Trucking Service, 292 F.2d 668, 678 (5th Cir. 1961); Sutherland Paper, 183 F.2d at 931.

91 Freehill, 355 F.2d at 48; Schwarzer, Managing Civil

of its judicial function and a refusal to do that which it is duty bound to do. C.f., LaBuy v. Howes Leather Co., 352 U.S. 249 (1957) (mandamus proceeding). Such a departure from the accepted and usual course of judicial proceedings requires the exercise of this Court's supervisory powers over the federal judiciary, for the purpose of placing the coordinate elements of Rule 1 in true equipose and formulating guidelines for their construction and application to assure that the purposes of the rule are not frustrated. See Herbert v. Lando, 441 U.S. 153, 177 (1979); ACF Industries, Inc. v. E.E.O.C., 439 U.S. 1081 (1979) (Powell, Stewart and Rehnquist, JJ., dissenting from denial of certiorari); Schlagenhauf v. Holder, 379 U.S. 104 (1964).

Litigation: The Trial Judge's Role, Judicature, 402, 408 (April, 1978).

This Court's refusal to review the schedule imposed in this case will allow for a continued emphasis upon speed alone in the conduct of proceedings, as an end in itself, rather than upon the expeditious, yet orderly and effective conduct of discovery and trial preparation. This would have a major negative impact upon the effective enforcement of the antitrust laws, which rely heavily upon private treble-damage actions as a means of enforcement.[92] See, e.g., American Society of Mechanical Engineers v. Hydrolevel Corp., ____ U.S. ____, 102 S.Ct. 1935, 72 L.Ed. 2d 330, 343 (1982). Proper regard for the nature of sophisticated antitrust

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92 State Attorneys General play a major role in this enforcement, as reflected by 15 U.S.C. § 15(c), which authorizes state Attorneys General to sue as parens patriae to recover damages on behalf of citizens injured by violations of the antitrust laws.

conspiracies, the circumstantial evidence from which those conspiracies are inferred, and the time required to gather such evidence from documents and depositions during the course of discovery, and to review, analyze and assimilate that evidence for efficient, effective and meaningful presentation at trial, is essential for truly effective enforcement of the antitrust laws. Failure by the courts to allow antitrust plaintiffs a fair and adequate opportunity to pursue discovery in an expeditious, orderly and effective manner will have a profound chilling effect upon the initiation of such actions, contrary to the very intendment of the antitrust laws.

In the context of scheduling discovery and trial preparation, it is revealing to compare the time interval between the filing and disposition of

Petitioners' cases with the median time interval of antitrust cases in general. The interval between the transfer of these cases to the Eastern District of Pennsylvania under 28 U.S.C. § 1407 on March 3, 1978, and the rendering of the jury verdict in Petitioners' trial on December 2, 1980, was 33 months, or 2.75 years. Merits discovery was stayed for more than a third of that time.[93] While the median time interval between the filing and disposition of antitrust cases terminated during 1980 was 30 months, or 2.5 years, ten percent of those cases had an interval in excess of 64 months, or 5.3 years.[94] Since only eight percent of the cases terminated during 1980

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93 Merits discovery was stayed until the entry of Pretrial Order No. 30 on February 16, 1979. C/A App. pp. 863-866.

94 Annual Report of the Director of the Administrative Office of the United States' Courts (1980), p. 398 (Table C 5A).

terminated "at trial," however,[95] it is entirely reasonable to assume that the eight percent reaching trial comprised most of the group that exceeded 5.3 years in duration. Another comparison is revealing. The Department of Justice and the Federal Trade Commission spent two and a half years and one and a half years, respectively, investigating this case.[96] Petitioners, however, were allowed only 12.5 months within which to complete discovery.

C. The Exclusion Of Evidence And The Partial Directed Verdict Violated This Court's Mandate In Continental Ore

The decisions below disregard this Court's pronouncement in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962), that in ruling on

95 Id., p. 389 (Table C 4).
96 C/A App. pp. 1031-3.

Respondents' motion for a directed verdict the district court was required to view the evidence in the light most favorable to Petitioners, and to give Petitioners the benefit of every fair and reasonable inference to be drawn from the evidence. Rigid adherence to that mandate is of particular importance in antitrust cases, "where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

The excluded evidence was damning. As previously revealed, Exhibit 560 unequivocally demonstrated communication between a Mill Defendant, five mill-affiliated Merchant Defendants, and two Independent Merchant Defendants to eliminate price discounting and go to "firm bracket pricing." That letter

alone is sufficiently damning. However, in conjunction with the evidence revealing that those defendants did in fact circulate announcements of their firm pricing decision, the inference of conspiratorial conduct is overwhelming. In light of such evidence, the court of appeals's conclusion that submission of this evidence to the jury would have allowed "mere speculation . . . to do duty for probative facts" is astounding.[97]

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97 A27. The court of appeal's decision is remarkable in one other respect. The decision actually found that the excluded evidence was probative of the single conspiracy operating at both levels upon which evidence was presented at trial. The court's affirmance, however, was predicated on its misapprehension of the conspiracy actually alleged and presented by petitioners. A26-A27.

D. The Exclusion Of Arkansas Purchase Evidence Reflects Total Disregard For The Procedural Safeguards Expressly Provided By Rule 33(c), F. R. Civ. P.

The orders below ignore the express provisions of Rule 33(c) of the Federal Rules of Civil Procedure. Petitioners' production of the very purchase documents from which the information elicited by the forms interrogatories could have been derived or ascertained, in lieu of undertaking the burden and expense of themselves extracting the information from the documents and completing the forms, was entirely justified and constituted a sufficient and good faith response to the interrogatories under the rule.[98] It is difficult to imagine a set of interrogatories more suited for a Rule

98 See, Daiflon, Inc. v. Allied Chemical, 534 F.2d 221 (10th Cir. 1976); Technitrol, Inc. v. Digital Equipment Corporation, 62 F.R.D. 91 (N.D. Ill. 1972); and Milsen v. Southland Corp., 16 F.R.Serv. 2d (M.D. Ill. 1972).

33(c) response. Petitioners' uncontroverted affidavits accompanying their motion for reconsideration of the order requiring them to complete the forms, and the various responses themselves, clearly establish that the conditions to invoking the option provided by the rule were satisfied.[99] The information elicited by the forms could be derived or ascertained from the face of the purchase documents produced by Petitioners; the burden of obtaining the information was substantially the same for Respondents as for Petitioners; and the purchase records containing the

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99 Respondents at no time specified any deficiencies in Petitioners' Rule 33(c) responses, or specific data elicited by the forms which was not included in the documents offered and produced under the rule. It was their burden to do so. Daiflon, 534 F.2d at 227. Nor did respondents at any time controvert Petitioners' affidavits setting forth relevant information regarding the propriety of their Rule 33(c) responses.

elicited information were not only specified by category and location, but had been produced and made available to Respondents for inspection and copying, and in fact copied, in response to earlier discovery requests nearly a year and a half prior to the time the forms interrogatories were propounded.[100]

The Advisory Committee notes to the rule state that subdivision (c) relates especially to the very interrogatories involved in this proceeding - those "which require a party to engage in burdensome or expensive research into his own business records in order to give an

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100 The last sentence of current Rule 33(c) was added as part of the 1980 amendments to the rules, and was not effective at the time of Petitioners' responses. Nonetheless, it is evident from the responses, and from the fact that a discrete group of purchase documents had been produced to Respondents, that the requirements established by the last sentence were met as well.

answer." The notes further comment that the subdivision "places the burden of discovery upon its potential benefitee." C.f., Oppenheimer Fund Inc. v. Sanders, 437 U.S. 340, 356-357 (1978).

The circuit court's decision ignores entirely the manifest sufficiency of Petitioners' responses under Rule 33(c), the purpose and underlying policy of the rule, and Respondents failure at any stage of this proceeding to specify the claimed deficiencies in Petitioners' production of documents or the information available therefrom. If Petitioners' responses were insufficient, it is apparent that use of the procedural safeguard offered by Rule 33(c) would never be justified. The circuit court's decision effectively deletes Rule 33(c) from the Federal Rules. For this reason, supervisory review by this court is essential.

E. The Denial Of Class Certification Was Premised Upon A Distortion Of The Commonality Requirement Of Rule 23, F. R. Civ. P.

The district court's denial of class certication for Petitioners hinged on its comparison of the conspiracy alleged by Petitioners with the consiracy alleged by the Certified Plaintiffs.[101] The purpose of Rule 23, Federal Rules of Civil Procedure, however, is to judge each class on its own merits, not to compare one class with another. Regardless of what perceived differences existed between the conspiracy allegations of the respective plaintiffs, the fact remains that proper application of Rule 23 requires a comparison only of the claims asserted by the plaintiff-class representative and the claims asserted on behalf of the members of the class it

101 C/A App. p. 916.

purports to represent. Specifically, in considering whether common questions of law or fact exist for purposes of certification, the only comparison required by Rule 23 is a comparison of the questions of law or fact to be relied upon by a plaintiff with the questions of law or fact which would be relied upon by the class members. Class certification decisions turn on whether questions of fact are common between the class representative and the class it seeks to represent; not whether the questions of fact are common between two separate classes.[102]

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102 The district court's comparison of one class with another reflects its efforts as a transferee judge under § 1407 to transform all coordinated cases into a homogenous group. Cases transferred under § 1407, however, are not fungible commodities, and any efforts to treat them as such, or force them to become such, distort the very purpose of § 1407.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the Petition For Writ Of Certiorari should be granted.

DATED: November 9, 1982.

Respectfully submitted,

JOHN R. ELLIS
Senior Assistant Attorney General
JAMES KIRKHAM JOHNS *
Assistant Attorney General
Office of the Attorney General
1366 Dexter Horton Building
Seattle, Washington 98104

* Counsel of Record

On Behalf Of Petitioners

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2341/42/43/44/45/46/47/48/49/50

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

THE STATE OF ALASKA, on its own behalf and on behalf of its cities, boroughs, and other political subdivisions

v.

BOISE CASCADE CORPORATION, a Delaware Corporation; CHAMPION INTERNATIONAL CORPORATION, A New York Corporation; CROWN ZELLERBACH CORPORATION, a Nevada Corporation; GREAT NORTHERN NEKOOSA CORPORATION, A Maine Corporation; HAMMERMILL PAPER COMPANY, a Pennsylvania Corporation; INTERNATIONAL PAPER COMPANY, a New York Corporation; KIMBERLY CLARK CORPORATION, a Delaware Corporation; THE MEAD CORPORATION, an Ohio Corporation; POTLATCH CORPORATION, a Delaware Corporation; SCOTT PAPER COMPANY, a Pennsylvania Corporation; ST. REGIS PAPER COMPANY, a New York Corporation; UNION CAMP CORPORATION, a Virginia Corporation; WAUSAU PAPER MILLS CO., a Wisconsin Corporation; WESTVACO CORPORATION, a Delaware Corporation; WEYERHAEUSER COMPANY, a Washington Corporation; BLAKE, MOFFIT & TOWNE, INC., a division of SAXON INDUSTRIES, INC., a New York Corporation; WESTERN PAPER COMPANY, a Division of Hammermill Paper Company, a Pennsylvania Cor-

poration; and ZELLERBACH PAPER COMPANY, a Division of Crown Zellerbach Corporation, a Nevada Corporation,

State of Alaska,
Appellant in No. 81-2341

(D.C. Civil No. 78-2958)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

STATE OF COLORADO

v.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, d/b/a/ Zellerbach Paper Company, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY, BUTLER PAPER COMPANY and DIXON PAPER COMPANY,

State of Colorado,
Appellant in No. 81-2342

(D.C. Civil No. 78-1359)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

STATE OF WASHINGTON, on behalf of itself and its public entities

v.

BOISE CASCADE CORP., CHAMPION INTERNATIONAL CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, POTLATCH, INC., SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, WEYERHAEUSER COMPANY, BLAKE, MOFFITT & TOWNE, INC., a Division of SAXON INDUSTRIES, INC., CARPENTER-OFFUTT PAPER COMPANY, INC. a Division of UNISOURCE CORP., ZELLERBACH PAPER COMPANY, a Division of CROWN ZELLERBACH CORPORATION,

State of Washington,
Appellant in No. 81-2343

(D.C. Civil No. 78-3081)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

STATE OF MISSOURI

v.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY CORPORATION,

BUTLER PAPER COMPANY, GRAHAM PAPER COMPANY, BERMINGHAM & PROSSER COMPANY, DISTRIBIX, INC. PAPER SUPPLY COMPANY, AND SHAUGHNESSY-KNIE-PHAWE PAPER COMPANY,

State of Missouri,
Appellant in No. 81-2344

(D.C. Civil No. 78-1095)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

THE STATE OF OREGON, on its own behalf and on behalf of its cities, counties, and other political subdivisions,

v.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY, BLAKE, MOFFITT & TOWNE, Division of SAXON INDUSTRIES, INC., CARPENTER-OFFUTT PAPER COMPANY, Division of UNISOURCE CORPORATION, WESTERN PAPER COMPANY, Division of HAMMERMILL PAPER COMPANY, and ZELLERBACH PAPER COMPANY, Division of CROWN ZELLERBACH CORPORATION,

State of Oregon,
Appellant in No. 81-2345

(D.C. Civil No. 78-1050)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D. C. MDL No. 323)

THE STATE OF CALIFORNIA, on behalf of itself and all political subdivisions, public agencies and districts within the State similarly situated

v.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY, BUTLER PAPER COMPANY, an affiliate of GREAT NORTHERN NEKOOSA CORP., J. C. PAPER COMPANY, an affiliate of WAUSAU PAPER MILLS CO., NATIONWIDE PAPERS, INCORPORATED, a division of CHAMPION INTERNATIONAL CORP., SEABOARD PAPER COMPANY, an affiliate of MEAD CORP., ZELLERBACH PAPER COMPANY, a division of CROWN ZELLERBACH CORP., BLAKE, MOFFITT & TOWNE, a division of SAXON INDUSTRIES, INC., CARPENTER-OFFUTT PAPER COMPANY, a division of UNISOURCE CORP., INGRAM PAPER COMPANY and NOLAND PAPER COMPANY (Carpenter/Offutt Paper Co.),

State of California,
Appellant in No. 81-2346

(D.C. Civil No. 78-2494)

(D.C. Civil No. 78-2494)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

NEBRASKA, STATE OF

v.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS CO., WESTVACO CORPORATION, WEYERHAUSER COMPANY, CROWN ZELLERBACH CORPORATION, KIMBLERLY CLARK and WESTERN PAPER CO., a Division of Hammermill Paper Company,

State of Nebraska,
Appellant in No. 81-2347

(D.C. Civil No. 78-1049)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

STATE OF IOWA, by its Attorney General, Richard C. Turner

v.

BOISE CASCADE CORP.; CHAMPION INTERNATIONAL CORPORATION; THE MEAD CORPORATION; GREAT NORTHERN NEKOOSA CORPORATION; HAMMERMILL PAPER COMPANY; INTERNATIONAL PAPER COMPANY; POT-

LATCH CORPORATION; SCOTT PAPER COMPANY; ST. REGIS PAPER COMPANY; UNION CAMP CORPORATION; WAUSAU PAPER MILLS CO.; WESTVACO CORP.; and WEYERHAEUSER COMPANY,

State of Iowa,
Appellant in No. 81-2348

(D.C. Civil No. 78-1096)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

MONTANTA, STATE OF

v.

BOISE CASCADE CORP.; CHAMPION INTERNATIONAL CORP.; GREAT NORTHERN NEKOOSA CORP.; HAMMERMILL PAPER CO.; INTERNATIONAL PAPER CO.; MEAD CORP.; THE POTLATCH CORP.; SCOTT PAPER CO.; ST. REGIS PAPER CO.; UNION CAMP CORP.; WAUSAU PAPER MILLS CO.; WESTVACO CORP.; WEYERHAEUSER CO.; CROWN ZELLERBACH CORP.; and KIMBERLY CLARK,

State of Montana,
Appellant in No. 81-2349

(D.C. Civil No. 78-3576)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D. C. MDL No. 323)

STATE OF ARKANSAS

v.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTH-

ERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WESTERN PAPER COMPANY, GRAHAM PAPER COMPANY,

State of Arkansas,
Appellant in No. 81-2350

(D.C. Civil No. 78-1716)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 15, 1982

Before: ALDISERT, GIBBONS, and
HIGGINBOTHAM, *Circuit Judges*

(Filed July 16, 1982)

Louise E. Ma, Esquire
Mark E. Ashburn, Esquire
Office of the Attorney General
420 "L" Street, Suite 100
Anchorage, Alaska 99501
Counsel for Appellant
State of Alaska in No. 81-2341

Thomas P. McMahon, Esquire
Office of the Attorney General
Antitrust Unit
Enforcement Section
Department of Law, Third Floor
1525 Sherman Street
Denver, Colorado 80203
Counsel for Appellant
State of Colorado in No. 81-2342

John R. Ellis, Esquire
James Kirkham Johns,
Esquire (Argued)
Office of the Attorney General
1366 Dexter Horton Building
Seattle, Washington 98104
Counsel for Appellant
State of Washington in
Nos. 81-234[illegible] and 81-2343

William Newcomb, Esquire
Office of the Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
Counsel for Appellant
State of Missouri in No. 81-2344

Richard L. Caswell, Esquire
Antitrust Division
Department of Justice
100 State Office Building
Salem, Oregon 97310
Counsel for Appellant
State of Oregon in No. 81-2345

Patricia A. Cutler, Esquire
Charles M. Kagay, Esquire
Department of Justice
6000 State Office Building
350 McAllister Street
San Francisco, California 94102
Counsel for Appellant
State of California in No. 81-2346

Dale A. Comer, Esquire
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509
Counsel for Appellant
State of Nebraska in No. 81-2347

John R. Perkins, Esquire
Antitrust Division
Department of Justice
Second Floor
Hoover State Office Building
Des Moines, Iowa 50319
Counsel for Appellant
State of Iowa in No. 81-2348

Jerome J. Cate, Esquire
Antitrust Enforcement Bureau
Office of the Attorney General
State Capitol
Helena, Montana 59601
Counsel for Appellant
State of Montana in No. 81-2349

Callis L. Childs, Esquire
Antitrust Division
Office of the Attorney General
Justice Building
Little Rock, Arkansas 972201
Counsel for Appellant
State of Arkansas in No. 81-2350

Patrick W. Kittredge, Esquire
Kittredge, Kaufman & Donley
800 North American Building
121 South Broad Street
Philadelphia, Pennsylvania 19107
Liaison Counsel for All Appellees and for The Mead Corp.

Reed E. Hundt, Esquire
James R. Asperger, Esquire
Latham, Watkins & Hills
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

John P. Borgwardt, Esquire
Boise Cascade Corporation
1600 S.W. 4th Avenue
Portland, Oregon 97201
Counsel for Appellee Boise Cascade Corp.

Gordon B. Spivack, Esquire
Norman H. Seidler, Esquire
Stephen Hogan, Esquire
James R. Eiszner, Jr., Esquire
Lord, Day & Lord
25 Broadway
New York, New York 10004
Counsel for Appellee Champion International Corporation

William R. Norfolk, Esquire
Bruce E. Clark, Esquire
William H. Knull, III, Esquire
Martin J. Conlon; Esquire
Sullivan & Cromwell
125 Broad Street
New York, New York 10004
Counsel for Appellee Crown Zellerbach Corporation

Richard K. Decker, Esquire
Michael P. Comiskey, Esquire
Lord, Bissell & Brook
115 South LaSalle Street
Chicago, Illinois 60603
Counsel for Appellee Great Northern Nekoosa Corporation and Butler Paper Company

Howard Adler, Jr., Esquire
Marc S. Palay, Esquire
Gregory J. Vogt, Esquire
Bergson, Borkland, Margolis & Adler
11 DuPont Circle, N.W.
Washington, D.C. 20036
Counsel for Appellee Hammermill Paper Company

Erwin C. Heininger, Esquire
Ned Robertson, Esquire
John T. Hundley, Esquire
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604
Counsel for Appellee International Paper Company

H. Blair White, Esquire (Argued)
Nathan P. Eimer, Esquire
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
Counsel for Appellee Kimberly-Clark Corporation

Harold F. Baker, Esquire
Alan Wiseman, Esquire
Robert M. Bruskin, Esquire
Scott E. Flick, Esquire
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Counsel for Appellee
The Mead Corporation

Robert B. Owen, Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Norman M. Heisman, Esquire
James A. Corrodi, Esquire
Scott Paper Company
Scott Plaza
Philadelphia, Pennsylvania 19113
Counsel for Appellee
Scott Paper Company

Stephen C. Neal, Esquire
Joel G. Chefitz, Esquire
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601
Counsel for Appellee
Weyerhaeuser Company

OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

These consolidated appeals present several procedural issues arising from a complex antitrust proceeding. Ten states, plaintiffs below, appeal from judgments entered on a jury verdict in their actions for treble damages alleging a nationwide price-fixing conspiracy in vio-

lation of §1 of the Sherman Act. The defendants did not offer any evidence at trial, but rested at the close of the plaintiffs' case; the jury then found in favor of all defendants. On appeal, the plaintiffs assert numerous procedural errors, generally contending that the district court unduly limited their opportunity to develop and present their case. We are not persuaded that the district court either abused its discretion or erred in its selection, interpretation, or application of the controlling legal precepts, and therefore we will affirm its judgment in all respects.

I.

This case has a complicated procedural history, owing in part to the number of parties. Named as defendants were manufacturers and merchants of "fine paper,"[1] which the states buy in large quantity. Some of the merchants are owned by the mills themselves and some are independent. Beginning in 1977, following the initiation of ultimately inconclusive investigations by the Federal Trade Commission and the United States Department of Justice, several states and private plaintiffs brought a total of 37 individual actions alleging that the mills and merchants had participated in a nationwide price-fixing conspiracy. Pursuant to 28 U.S.C. §1407, the Judicial Panel on Multi-District Litigation transferred the cases to the Eastern District of Pennsylvania for coordinated pre-trial proceedings, assigned to Judge

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1. The district court defined "fine paper" to include

> all printing and writing papers and all paper products into which such papers are converted, including coated and uncoated book, publication (excluding newsprint), printing and converting papers, offset papers, chemical writing papers (bond and writing, form bond, ledger, mimeograph, duplication and related papers), cotton content papers, cover and text papers, thin papers (excluding cigarette, condenser and filter papers), and bristols.

In re Fine Paper Antitrust Litigation, 82 F.R.D. 143, 147 (E.D.Pa. 1979).

Joseph L. McGlynn.[2] *In re Fine Paper Antitrust Litigation*, 446 F.Supp. 759 (J.P.M.D.L. 1978) (per curiam); 453 F.Supp. 118 (J.P.M.D.L. 1978) (per curiam).

The district court divided the plaintiffs into three groups: a class of private plaintiffs, "minority states," and "majority states." The minority states alleged only a horizontal conspiracy among the mill defendants; the majority states, the present appellants, alleged both a horizontal conspiracy among the mill defendants and vertical conspiracies involving mills and merchants. In addition to certifying a class of private plaintiffs, the court certified each minority state and its respective government entities as a separate plaintiff class,[3] but it refused to do the same for the majority states because the added factor of vertical conspiracy made those actions less susceptible to generalized proof. *In re Fine Paper Antitrust Litigation*, 82 F.R.D. 143 (E.D.Pa. 1979). *See* Fed. R. Civ. P. 23(b)(3).

Following a pre-trial conference on March 7, 1979, the court established discovery deadlines and set a tentative trial date of January 2, 1980. The next few months were occupied with discovery and related motions. On September 27, 1979, plaintiffs asked for an extension of the trial date because of the number of depositions they wished to take, but the court expressed reluctance to deviate from its schedule. At a conference on December 4, 1979, the court rejected plaintiffs' proposal that trial not begin until October 1980, but it rescheduled the trial for the "certified plaintiffs" (the private plaintiffs and the minority states) to September 22, 1980, barring a "nu-

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2. This court previously has considered other issues arising from these proceedings. *See In re Fine Paper Litigation State of Washington*, 632 F.2d 1081 (3d Cir. 1980) (dismissal of settling defendants; assignment of claims); *In re Fine Paper Antitrust Litigation*, 617 F.2d 22 (3d Cir. 1980) (disqualification of class attorneys).

3. Each of these classes comprised the state and its cities, counties, other political subdivisions, school districts, government universities, and community colleges that had purchased fine paper from defendants.

clear holocaust." The court did not fix a trial date for the majority states, but it established July 3, 1980, as the discovery cut-off date in all of the cases.

On January 15, 1980, the court decided it could resolve the litigation more efficiently if trial on the majority states' claims were conducted in advance of the certified plaintiffs' trial. It then set for the majority states a trial date of June 16, 1980, and a revised discovery deadline of May 30. Appellants vehemently protested that they still had 300,000 documents to review and more than 100 depositions to take, and that the court's revised schedule left inadequate time for discovery and trial preparation. The court denied their motion for reconsideration.

On January 17, 1980, the court entered an order that all parties would be deemed to have consented to venue and to have waived objections to trial in the Eastern District of Pennsylvania unless they filed written objections. The majority states opposed the proposed transfer.

In early June 1980, in contemplation of a June 16 trial, the majority states submitted a 200-page pre-trial memorandum. Defendants moved to dismiss, contending that the memorandum was unacceptable because it presented only conclusory allegations rather than the specific enumeration of facts the court had required. The court did not grant defendants' motion, but it ordered plaintiffs to prepare a memorandum by July 25 "which outlines the case chapter and verse as to each defendant." App. at 2064-65. Plaintiffs moved for a continuance, again complaining that they had not been allowed enough time for discovery. The court stated that the majority states' actions would be tried with or after the certified plaintiffs' trial. It did not modify the discovery schedule, but it did allow some additional depositions.

The certified plaintiffs settled their cases shortly before trial. On September 25, 1980, the court announced

that the majority states' trial would begin on October 6, 1980 — nine months after the tentative trial date and four months after the trial date set on January 15, 1980. Although they had been on notice since January 17, 1980, that the court wished to try the cases itself, the plaintiffs objected that they would have insufficient time to set up a Philadelphia office and to transport their files across the country. The court considered these arguments but concluded that October 6 was a realistic date.

On September 29, 1980, over plaintiffs' objections, the district court, pursuant to 28 U.S.C. §1404(a), formally transferred all of the majority states' cases to the Eastern District of Pennsylvania for trial, which began on October 6, 1980. Following plaintiffs' four-week presentation, which consisted primarily of reading depositions to the jury, the defendants rested without offering any evidence. The jury returned a verdict in favor of all defendants on December 2, 1980.

II.

Appellants present several challenges to the district court's conduct of the trial and the pre-trial proceedings. They argue that the trial court abused its discretion in scheduling the discovery cut-off and trial dates; that it improperly transferred the actions to itself for trial under 28 U.S.C. §1404(a); that it erred by refusing to admit conditionally the out-of-court statements of alleged co-conspirators; that it erred in entering a partial directed verdict for defendants on claims arising from purchases from independent merchants; that it erred in denying class certification to each of the majority states; that in imposing a discovery sanction it erred in excluding evidence submitted by the state of Arkansas; and that it erred both in ruling that fine paper purchases of state colleges and universities were not state purchases and thereafter in denying plaintiffs' motion to amend their complaints to add those institutions as parties. We consider these contentions seriatim.

III.

Appellants' primary argument is that they were afforded too little time for discovery and trial preparation. Appellants have a heavy burden to bear, however, as matters of docket control and conduct of discovery are committed to the sound discretion of the district court. *Business Ass'n of University City v. Landrieu*, 660 F.2d 867, 877 (3d Cir. 1981); *Borden Co. v. Sylk*, 410 F.2d 843, 845 (3d Cir. 1969). We will not interfere with a trial court's control of its docket "except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant." *Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F.2d 1096, 1105 (5th Cir. 1972). Similarly, we will not upset a district court's conduct of discovery procedures absent "a demonstration that the *court's* action made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery was impossible." *Id.*

We find no abuse of discretion by the district judge in his scheduling of discovery or of the trial. After considering all of appellants' contentions and examining the 16-volume appendix that they have supplied to this court, we are not persuaded that the pre-trial rulings of the district court prejudiced the preparation or presentation of their case. The trial of their antitrust claims followed fifteen months of discovery, including approximately 270 depositions and production of nearly two million documents. The trial commenced four months after conclusion of discovery and one month after the date appellants had earlier set as the date on which they would be ready for trial.[4]

When discovery ended on May 30, 1980, the majority states sought a continuance and further discovery.

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4. On June 16, 1980, counsel for appellants explained to the court: "I think we may need to September 1 to *accomplish everything* . . . ." App. at 2068 (emphasis added).

The court allowed them to depose some additional witnesses and, relying on their representation that they would need until September 1 to prepare for trial, advised them that their trial would commence with or after the certified plaintiffs' trial, scheduled for September 22, 1980.

Upon settlement of the certified plaintiffs' cases, the court on September 25, 1980, notified appellants that their trial would commence on October 6. Appellants again requested a continuance, but the district court responded:

> Every time I set a deadline I get the same problem arising from the Majority States. They're never ready. They can't go to trial, the case is going to be prejudiced. The same thing happened in June, the same thing when I asked you to file answers to these interrogatories and you didn't have the time. The same thing happened when I asked you to file your pretrial memorandum. You said you didn't have the time, you needed more time, you wanted to supplement. I gave you time to supplement. It hasn't even been supplemented yet, except for a couple of states. It's just constant.

App. at 3970-71. Having reviewed the record, we consider the district court's observations to be accurate. Moreover, we do not share the view expressed by appellants' counsel at oral argument that antitrust cases involving price fixing are generically complex. It has been our experience that the legendary complexity is due largely to the parties' inability or unwillingness to simplify their presentations. Our independent review of the record persuades us that the trial court in this case was firm but fair. It deferred the trial date from January 2 to June 16 to October 6, 1980, and it accommodated appellants' requests whenever feasible. The appellants have not shown that "the court's action made it impossible to obtain crucial evidence"; nor have they made a clear show-

ing that the court's conduct "resulted in actual and substantial prejudice." We find no abuse of discretion.

IV.

Appellants also argue that the district court improperly transferred the cases to the Eastern District of Pennsylvania under 28 U.S.C. §1404(a) and that it should have sent the cases back to the states' home districts, or alternatively to the Northern District of California, the plaintiffs' preferred forum, for trial.[5] Section 1404(a) states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The gravamen of appellants' contention is that at the time the states' complaints were filed, venue in the Eastern District would have been improper with respect to some of the defendants. At the time of the transfer, however, those particular defendants had settled and were no longer in the case.

Relying on *Hoffman v. Blaski*, 363 U.S. 335 (1960), appellants read §1404(a)'s phrase, "where it might have been brought," to preclude a transfer notwithstanding the prior settlement of all parties as to whom venue in the transferee district would have been improper. Assuming that plaintiffs have sustained the prejudice necessary to assert this venue argument, we do not read *Hoffman* and §1404(a) to be so grudging. In *Hoffman*

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5. Rule 11(b) of the Judicial Panel on Multidistrict Litigation's Rules of Procedure provides that:

> Each transferred action that has not been terminated in the transferee court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. §1404(a) or 28 U.S.C. §1406. In the event that the transferee judge transfers an action under 28 U.S.C. §§1404(a) or 1406, no further action of the Panel shall be necessary to authorize further proceedings including trial.

the defendants themselves requested the transfer, consenting to proceed in a district in which they could have objected to venue at the outset. The Supreme Court held that the power to transfer under §1404(a) does not depend "upon the wish or waiver of the defendant." 363 U.S. at 343. *Hoffman* thus precludes transfer over a plaintiff's objections to a district in which venue would be improper as to a defendant who remained a party to the action. In this case, by contrast, the defendants as to whom venue in the Eastern District would have been improper were no longer parties at the time of transfer.

We agree with the district court that it was not required to confine its venue consideration to the facts as they existed at the time of the complaint. Just as venue defects as to a party whose portion of the action has been severed do not bar transfer of the remainder of the action, *Wyndham Associates v. Bintliff*, 398 F.2d 614, 618-19 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968), a party's settlement of his portion of the action cures any objection to venue in the transferee district with respect to that party. *Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 447 F.Supp. 381 (N.D. Okla. 1978). *See also* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3845 (1976). At the time of the transfer to the Eastern District, the action "might have been brought" in the Eastern District as to all of the parties remaining in the case. Appellants would have us hold that even if the trial below were otherwise error free, a new trial would be warranted because some of their earlier adversaries — who were no longer parties to the suit at the time trial began — could have objected to venue in the Eastern District had transfer been attempted prior to their settlements. Their reading of §1404(a) and *Hoffman* reflects adherence to the tradition of mechanical jurisprudence — following "a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme,' " *Hynes v. New York Cent. R. Co.*, 231 N.Y. 229, 235, 131 N.E. 898, 900 (1921) (Cardozo, J.).

We are disinclined to accept appellants' interpretation, and we hold that the district court did not err.[6]

Nor do we conclude that in transferring the actions to itself for trial the district court abused its discretion. Although the district court did not expressly quantify the interest in plaintiffs' convenience, it concluded that plaintiffs' convenience was outweighed by the comparative economy of trying one action in the Eastern District rather than several actions in the states' home districts. Given the complexity of the proceedings, we consider this conclusion to be reasonable. Moreover, we also believe that in an appropriate case the court may properly consider whether judicial efficiency would be served by enabling the judge who has presided over the pre-trial phase of a multi-district proceeding, and thereby has become familiar with the parties and the issues, to try the actions himself rather than to return them to one or more district judges who must acquaint themselves with the cases' complexities.[7] We conclude that the district

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6. Appellants argue alternatively that at the filing of the complaint, venue would have been improper in the Eastern District as to defendant Butler Paper, a company that did not settle and is one of the present appellees. The district court addressed this contention, however, and specifically found that the case against Butler could have been brought in the Eastern District of Pennsylvania. The court did not state with particularity the reasons underlying its conclusion, but there was evidence in the form of an affidavit from an official of defendant Weyerhaeuser Co. that Butler purchased a large amount of paper from a Weyerhaeuser mill in Eastern Pennsylvania, constituting transaction of business sufficient to establish venue in the Eastern District of Pennsylvania under 15 U.S.C. §22. We conclude, therefore, that the district court did not err in determining that the transfer was proper as to Butler.

7. The second circuit considered a similar problem of multi-district litigation in *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971) (per curiam). A district judge who had conducted the pre-trial proceedings while sitting by designation in the Southern District of New York, decided to transfer the actions to his own District of Minnesota for trial. Defendants opposing the transfer peti-

court neither erred in its interpretation of the law applicable to transfers under §1404(a) nor abused its discretion in transferring to itself for trial the proceeding over which it had presided in the pre-trial stage.

V.

Appellants argue next that the district court abused its discretion in not admitting evidence of certain declarations of co-conspirators made during the course and in furtherance of the conspiracy. Appellants appear to present a two-tiered argument relying on Fed. R. Evid. 801(d)(2)(E), *United States v. Continental Group*, 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980), and *United States v. Trowery*, 542 F.2d 623 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977). Although the elements of their argument are blurred, they appear to contend that the district court was obligated to determine the competency of the proffered evidence by considering whether plaintiffs had made a sufficient showing that a joint undertaking existed at the time of the statements; and alternatively that

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tioned for a writ of mandamus. The court of appeals denied the petition and noted that the judge

> indicated that he felt that because of the complexity of these cases the interests of judicial efficiency made it highly desirable that the judge who conducted the pretrial proceedings continue as the trial judge, and that it would be impossible for him to remain in the Southern District of New York for the length of time that these trials were expected to take. While the convenience of the judge is, of course, not normally a factor to be weighed in considering a section 1404(a) motion, in the unusual circumstances of this case we do not feel that it was an abuse of discretion to give some consideration to this problem in balancing the various interests. In any litigation of this type it would, of course, be impossible to find any forum that was totally convenient to all those involved. Judge Lord's solution appears fully justified under the circumstances.

Id. at 125.

even absent such a determination, the court nevertheless was required to admit the evidence conditionally.

Evidence of extra-judicial statements made by alleged co-conspirators may be admitted upon the court's finding that there is a sufficient showing of a common enterprise by means of evidence independent of the proffered declaration. *Trowery*, 542 F.2d at 626-27. Alternatively, the court may admit the hearsay evidence subject to later connection. *Continental Group*, 603 F.2d at 457. We believe that in this case the district court's refusal to admit the extra-judicial statements included an implicit determination that plaintiffs had not met their burden under *Trowery*. *Cf. Continental Group*, 603 F.2d at 457 (finding that government had met its burden under *Trowery* was implicit in court's denial of defendants' motion to strike). Significantly, appellants do not direct our attention to any independent evidence on which the court might have based a determination of competency.[8] Thus, appellants must rely on their argument that the district court was required to admit the evidence conditionally. In this regard we believe appellants misread *Continental Group*. In that decision we held that a trial court in its discretion may — not must — admit alleged co-conspirators' declarations under Rule 801(d)(2)(E) subject to later connection. We expressed our concern for the possible prejudice to conspiracy defendants that could result from conditional admission where the competency of the evidence is not thereafter demonstrated, and we stated that conditional admission should be used sparingly. As Chief Judge Seitz wrote for the court

> This court has recognized that there is a real danger in a conspiracy trial involving numerous de-

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8. For this reason we need not reach appellants' contention that in a civil conspiracy case the plaintiff need make out only a prima facie case of conspiracy as a prerequisite to admission.

> fendants that the jury may find a particular defendant guilty merely because of his association with the other defendants. *See United States v. American Radiator & Standard Sanitary Corp.*, [433 F.2d 174, 195 (3d Cir. 1970)]. One aspect of this danger is that the trial judge, after admitting hearsay declarations of alleged co-conspirators subject to later connection, may find at the close of all the evidence that the government has not borne its burden of proving by independent evidence that those declarations were made during the course and in furtherance of a conspiracy joined in by both the defendant and the declarant. Cautionary instructions to the jury might not suffice to cure the resulting prejudice to the defendant.

603 F.2d at 456. We find no abuse of discretion in the trial court's exclusion of the out-of-court declarations of alleged co-conspirators in this case.

VI.

Prior to submitting the case to the jury, the trial court granted in part defendants' motion for directed verdict. Finding no proof of a single nationwide conspiracy involving both the mills and the independent merchants, the court barred claims against the mills based on plaintiffs' purchases from independent merchants[9] and permitted only proof relating to the mill and mill-owned merchant defendants.[10] Appellants' primary

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9. Plaintiffs settled their claims against all independent merchant defendants before trial.

10. The district court stated:

> [T]his record has not established proof of a single unitary nationwide conspiracy, including both the mills and the independent merchants. So to the extent that any of your claims are based upon sales or purchases from independent merchants, including those named as defendants in this case, your claims will not be allowed. Whatever proof will be permitted will be

concern seems not to be the exclusion of their claims based on purchases from the independent merchants, however, but that certain evidence which they argue was probative of their conspiracy claims against the mills and the mill-owned merchants was thereby "excised." Thus, appellants' challenge of the directed verdict has two dimensions: that the directed verdict itself was improperly granted, and that their case against the mills and mill-owned merchants was unfairly prejudiced by their inability to use evidence relating to the independent merchants.

They argue first that, notwithstanding the district court's finding, there was a sufficient quantum of evidence relevant to the involvement of the independent merchants to enable a jury to grant relief. They fault the district court for examining each piece of evidence in isolation rather than viewing the evidence in its totality. This, they charge, was "compartmentalizing the proof," in violation of the teachings of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962). In *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105, 115 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), we stated the scope of appellate review applicable to directed verdicts:

> The appellate court must consider the record as a whole and in the light most favorable to the non-moving party, drawing all reasonable inferences to support its contentions. If no reasonable resolution of the conflicting evidence and inferences therefrom could result in a judgment for the non-moving party, the appellate court must affirm the lower court's decision.

NOTE — *(Continued)*

> proof [relating to the] mill-owned merchants from whom the individual states bought paper manufactured by the ten mill defendants in this case.

App. at 4499.

Applying this stringent standard of review, we have examined the record and are persuaded that the district court did not err. Plaintiffs alleged a nationwide conspiracy between mills and independent merchants. Viewed in the light most favorable to appellants, the evidence upon which they rely in their challenge to the directed verdict involves only communication among merchants relating to retail prices. Like the district court, we will not permit a jury to infer from communication at a lower level the existence of a conspiracy at a higher level as alleged in the complaints. Submission of this evidence to the jury would have required the jurors to resort to guesswork and conjecture, allowing "mere speculation . . . to do duty for probative facts." *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d at 115 (quoting *Galloway v. United States*, 319 U.S. 372, 395 (1943)). *Continental Ore* does not assist appellants. The "compartmentalizing" condemned by the Supreme Court consisted of a seriatim examination of the claims against each of five conspiracy defendants as if they were separate lawsuits, thereby overlooking the conspiracy claim itself. *See* 370 U.S. at 698-99. In the instant case the court refused to submit to the jury evidence which at best was probative of an alleged conspiracy unrelated to the conspiracy whose existence was in issue. We conclude that the district court did not err.

Nor can we conclude that appellants were prejudiced by the exclusion of evidence relating to the independent merchants. Notably, appellants do not contest appellees' observations that all of the excluded evidence deals with retail prices and that appellants purchased paper not at retail but only on the basis of bids. We do not perceive any prejudice resulting from the entry of the directed verdict.

VII.

Because of the view we take regarding the contentions discussed above, appellants' remaining arguments require only brief consideration. Again we find no error or abuse of discretion.

Noting that the district court certified classes of government entities for each of the minority states, appellants argue that the district court erred in denying similar certification to the majority states. They contend that the only difference between the two groups of plaintiff states was the majority states' allegations of vertical conspiracies among mills and independent merchants, and they argue that this distinction was an insufficient basis for denial of certification. We have said that a decision on class status is normally within the discretion of the trial court, *Gardner v. Westinghouse Broadcasting Co.*, 559 F.2d 209, 212 (3d Cir. 1977), *aff'd*, 437 U.S. 478 (1978), and we now conclude that the district court in this case acted wholly within the bounds of its discretion. One prerequisite to class certification under Fed. R. Civ. P. 23(b)(3) is a determination that common questions of fact or law predominate over questions affecting only individual members. The common issue here, whether there was a horizontal conspiracy among the mill defendants, easily could be overwhelmed by the separate proof required to establish that each individual independent merchant had participated with the mills in an individual vertical conspiracy. Proof as to vertical conspiracy would vary among the class members, depending on the identity of the merchants from whom the respective government entities purchased their paper. Given that appellants sought to include in their classes not only entities which purchased from the named defendants but also those who purchased from an unspecified number of alleged co-conspirators, the likely factual variations among the alleged vertical conspiracies seems to us a reasonable basis for denying certification under Rule 23(b)(3).

Appellants also charge that the district court abused its discretion when, as a sanction for failure to comply with a discovery order, it precluded plaintiff Arkansas from introducing evidence of its purchases of fine paper. Some of the defendants had served interrogatories and requests for production of documents on the states, seeking information about the states' purchases of fine paper. The states did not produce the requested information, but, relying on Fed. R. Civ. P. 33(c),[11] responded that the documents containing the relevant information already had been produced and that the defendants could find the information in those documents as easily as plaintiffs could. The court granted defendants' motion under Fed. R. Civ. P. 37(a) to compel answers. Plaintiffs continued to oppose discovery, and the court granted defendants' motion for sanctions but deferred imposition. Subsequently reminded at trial that Arkansas had not completed the interrogatories, the court prohibited Arkansas from introducing evidence relating to its purchases.

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11. Rule 33(c) provides:

Option to Produce Business Records.

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(as amended 1980).

We have indicated our deference to the trial court's determination of the relative burdens of sifting through documents under Rule 33(c), *Al Barnett & Son v. Outboard Marine Corp.*, 611 F.2d 32 (3d Cir. 1979), and we note that the rule appears to have been drafted in contemplation of the tactic attempted by plaintiffs. By its own terms the rule is unavailable unless "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." Fed. R. Civ. P. 33(c) (as amended 1980). The Advisory Committee on the Rules has noted, "The Committee is advised that parties upon whom interrogatories are served occasionally responded by directing the interrogating party to a mass of business records . . . justifying the response by the option provided by this subdivison. Such practices are an abuse of the option." *Id.* (Notes of Advisory Committee). Appellants have not persuaded us that the district court abused its discretion in applying these precepts. Similarly, we conclude that the district court acted within its discretion in selecting and imposing a sanction. In a proper case the court may dismiss entirely the claim of a party who will not cooperate in discovery. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). Given the nature of Arkansas' violation, the sanction imposed was appropriate: the evidence excluded bears a direct relation to the evidence sought under the discovery order. *Cf. Compagnie des Bauxites de Guinea v. Insurance Co. of North America*, 651 F.2d 877, 885 (3d Cir. 1981), *aff'd sub nom. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, ____ U.S. ____ (50 U.S.L.W. 4553, June 1, 1982) (defendants' failure to respond to requests for information relevant to personal jurisdiction over defendants warrants court's assumption of jurisdiction as a Rule 37(b)(2)(A) sanction). We find no abuse of discretion in the district court's handling of this matter.

Appellants' final argument relates to purchase of fine paper by the state colleges and universities of seven

of the plaintiff states. Late in the evidentiary phase of plaintiffs' trial presentation, the district court ruled that evidence of fine paper purchases by the colleges and universities would not be admitted because there had been no showing that the institutions were state agencies whose claims could be asserted by the state. The states subsequently sought to amend their complaints to add the institutions as parties plaintiff, but the court denied their motions.

Based on our examination of the record, we find no abuse of discretion. The states had provided no evidence from which the court could conclude that the educational institutions' purchases were effectively purchases by the states. Moreover, in view of our disposition of this appeal, even if we were to accept appellants' argument that the institutions are state agencies under relevant state law, failure to allow the damages claims was at worst harmless. As to the court's denial of the states' motion to amend, the complexity of the litigation and the late point in the proceedings at which the motion was presented lead us to find no abuse of discretion in refusing to add more parties to an already complicated proceeding.

VIII.

We have considered all of the contentions presented by the appellants and conclude that there was no abuse of discretion or reversible error.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2341/42/43/44/45/46/47/48/49/50

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

THE STATE OF ALASKA, on its own behalf and on behalf of its cities, boroughs, and other political subdivisions

vs.

BOISE CASCADE CORPORATION, a Delaware Corporation; CHAMPION INTERNATIONAL CORPORATION, A New York Corporation; CROWN ZELLERBACH CORPORATION, a Nevada Corporation; GREAT NORTHERN NEKOOSA CORPORATION, A Maine Corporation; HAMMERMILL PAPER COMPANY, a Pennsylvania Corporation; INTERNATIONAL PAPER COMPANY, a New York Corporation; KIMBERLY CLARK CORPORATION, a Delaware Corporation; THE MEAD CORPORATION, an Ohio Corporation; POTLATCH CORPORATION, a Delaware Corporation; SCOTT PAPER COMPANY, a Pennsylvania Corporation; ST. REGIS PAPER COMPANY, a New York Corporation; UNION CAMP CORPORATION, a Virginia Corporation; WAUSAU PAPER MILLS CO., a Wisconsin Corporation; WESTVACO CORPORATION; a Delaware Corporation; WEYERHAEUSER COMPANY, a Washington Corporation; BLAKE, MOFFIT & TOWNE, INC., a division of SAXON INDUSTRIES, INC., a New York Corporation; WESTERN PAPER COMPANY, a Division of Hammermill Paper Company, a Pennsylvania Corporation; and ZELLERBACH PAPER COMPANY, a Division of Crown Zellerbach Corporation, a Nevada Corporation,

State of Alaska
Appellant in No. 81-2341
(D.C. Civil No. 78-2958)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

STATE OF COLORADO

vs.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, d/b/a/ Zellerbach Paper Company, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY, BUTLER PAPER COMPANY, and DIXON PAPER COMPANY,

State of Colorado,
Appellant in No. 81-2342
(D.C. Civil No. 78-1359)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

STATE OF WASHINGTON, on behalf of itself and its public entities

vs.

BOISE CASCADE CORP., CHAMPION INTERNATIONAL CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, POTLATCH, INC., SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, WEYERHAEUSER COMPANY, BLAKE, MOFFITT & TOWNE, INC., a Division of SAXON INDUSTRIES, INC., CARPENTER-OFFUTT PAPER

COMPANY, INC. a Division of UNISOURCE CORP., ZELLERBACH PAPER COMPANY, a Division of CROWN ZELLERBACH CORPORATION,

State of Washington,
Appellant in No. 81-2343
(D.C. Civil No. 78-3081)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

STATE OF MISSOURI

vs.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY CORPORATION, BUTLER PAPER COMPANY, GRAHAM PAPER COMPANY, BERMINGHAM & PROSSER COMPANY, DISTRIBIX, INC. PAPER SUPPLY COMPANY, AND SHAUGHNESSY-KNIEP-HAWE PAPER COMPANY,

State of Missouri,
Appellant in No. 81-2344
(D.C. Civil No. 78-1095)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

THE STATE OF OREGON, on its own behalf and on behalf of its cities, counties, and other political subdivisions,

vs.

BOISE CASCADE CORPORATION, CHAMPION

INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY, BLAKE, MOFFITT & TOWNE, Division of SAXON INDUSTRIES, INC., CARPENTER-OFFUTT PAPER COMPANY, Division of UNISOURCE CORPORATION, WESTERN PAPER COMPANY, Division of HAMMERMILL PAPER COMPANY, and ZELLERBACH PAPER COMPANY, Division of CROWN ZELLERBACH CORPORATION,

State of Oregon,
Appellant in No. 81-2345
(D.C. Civil No. 78-1050)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

THE STATE OF CALIFORNIA, on behalf of itelf and all political subdivisions, public agencies and districts within the State similarly situated

vs.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY, BUTLER PAPER COMPANY, an affiliate of GREAT NORTHERN

NEKOOSA CORP., J. C. PAPER COMPANY, an affiliate of WAUSAU PAPER MILLS CO., NATIONWIDE PAPERS, INCORPORATED, a division of CHAMPION INTERNATIONAL CORP., SEABOARD PAPER COMPANY, an affiliate of MEAD CORP., ZELLERBACH PAPER COMPANY, a division of CROWN ZELLERBACH CORP., BLAKE, MOFFIT & TOWNE, a division of SAXON INDUSTRIES, INC., CARPENTER-OFFUTT PAPER COMPANY, a division of UNISOURCE CORP., INGRAM PAPER COMPANY and NOLAND PAPER COMPANY (Carpenter/Offutt Paper Co.),

State of California,
Appellant in No. 81-2346
(D.C. Civil No. 78-2494)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

NEBRASKA, STATE OF

vs.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS CO., WESTVACO CORPORATION, WEYERHAUSER COMPANY, CROWN ZELLERBACH CORPORATION, KIMBERLY CLARK and WESTERN PAPER CO., a Division of Hammermill Paper Company,

State of Nebraska,
Appellant in No. 81-2347
(D.C. Civil No. 78-1049)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

STATE OF IOWA, by its Attorney General,
Richard C. Turner
vs.
BOISE CASCADE CORP.; CHAMPION INTERNATIONAL CORPORATION; THE MEAD CORPORATION; GREAT NORTHERN NEKOOSA CORPORATION; HAMMERMILL PAPER COMPANY; INTERNATIONAL PAPER COMPANY; POTLATCH CORPORATION; SCOTT PAPER COMPANY; ST. REGIS PAPER COMPANY; UNION CAMP CORPORATION; WAUSAU PAPER MILLS CO.; WESTVACO CORP.; and WEYERHAEUSER COMPANY,

State of Iowa,
Appellant in No. 81-2348
(D.C. Civil No. 78-1096)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

MONTANA, STATE OF
vs.
BOISE CASCADE CORP.; CHAMPION INTERNATIONAL CORP.; GREAT NORTHERN NEKOOSA CORP.; HAMMERMILL PAPER CO.; INTERNATIONAL PAPER CO.; MEAD CORP.; THE POTLATCH CORP.; SCOTT PAPER CO.; ST. REGIS PAPER CO.; UNION CAMP CORP.; WAUSAU PAPER MILLS CO.; WESTVACO CORP.; WEYERHAEUSER CO.; CROWN ZELLERBACH CORP.; and KIMBERLY CLARK,

State of Montana,
Appellant in No. 81-2349
(D.C. Civil No. 78-3576)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

STATE OF ARKANSAS

vs.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WESTERN PAPER COMPANY, GRAHAM PAPER COMPANY,

State of Arkansas,
Appellant in No. 81-2350
(D.C. Civil No. 78-1716)

Appeal from
the United States District Court
for the
Eastern District of Pennsylvania

Present:
ALDISERT, GIBBONS and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Eastern District

of Pennsylvania and were argued by counsel on June 15, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered February 2, 1981, be, and the same are hereby affirmed. Costs taxed against appellants.

ATTEST:
/s/ Sally Mrvos
Clerk

July 16, 1982

Certified as a true copy
and issued in lieu of a
formal mandate on August 20, 1982.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk,
U.S. Court of Appeals
for the Third Circuit.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

On Appeal From
The United States District Court
For The Eastern District Of Pennsylvania
In Re: Fine Paper Antitrust Litigation
MDL Docket No. 323

STATE OF ALASKA	No. 81-2341
	(D.C. Civ. No. 78-2958)
STATE OF COLORADO	No. 81-2342
	(D.C. Civ. No. 78-1359)
STATE OF WASHINGTON	No. 81-2343
	(D.C. Civ. No. 78-3081)
STATE OF MISSOURI	No. 81-2344
	(D.C. Cir. No. 78-1095)
STATE OF OREGON	No. 81-2345
	(D.C. Cir. No. 78-1050)
STATE OF CALIFORNIA	No. 81-2346
	(D.C. Cir. No. 78-2494)
STATE OF NEBRASKA	No. 81-2347
	(D.C. Cir. No. 78-1049)
STATE OF IOWA	No. 81-2348
	(D.C. Cir. No. 78-1096)
STATE OF MONTANA	No. 81-2349
	(D.C. Cir. No. 78-3576)
STATE OF ARKANSAS	No. 81-2350
	(D.C. Cir. No. 78-1716)

Plaintiffs-Appellants,

v.

BOISE CASCADE CORPORATION, et al.,

Defendants-Appellees.

PETITION FOR REHEARING IN BANC

No. 81-2341:
Mark E. Ashburn, Esq.
Louise E. Ma, Esq.
Office of the Attorney General
420 "L" Street, Suite 100
Anchorage, AK 99501
(906) 276-3550

No. 81-2350:
Callis L. Childs, Esq.
Antitrust Division
Office of the Attorney General
Justice Building
Little Rock, AR 972201
(501) 371-1092

No. 81-2346:
Patricia A. Cutler, Esq.
Charles M. Kagay, Esq.
Department of Justice
6000 State Office Building
350 McAllister Stree
San Francisco, CA 94102
(415) 557-3651

No. 81-2342:
Thomas P. McMahon, Esq.
Office of the Attorney General
Antitrust Unit
Enforcement Section
Department of Law, Third Floor
1525 Sherman Street
Denver, CO 80203
(303) 866-3611

No. 81-2348:
John R. Perkins, Esq.
Antitrust Division
Department of Justice
Second Floor
Hoover State Office Building
Des Moines, IA 50319
(515) 281-6701

No. 81-2344:
William Newcomb, Esq.
Office of the Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321

No. 81-2349:
Jerome J. Cate, Esq.
Antitrust Enforcement Bureau
Office of the Attorney General
State Capitol
Helena, MT 59601
(406) 449-3825

No. 81-2347:
Dale A. Comer, Esq.
Department of Justice
2115 State Capitol
Lincoln, NE 68509
(405) 471-2682

No. 81-2345:
Richard L. Caswell, Esq.
Antitrust Division
Department of Justice
235 Union Street, Northeast
Salem, OR 97310
(503) 378-4732

Nos. 81-2342 and 81-2343:
John R. Ellis, Esq.
James Kirkham Johns, Esq.
Office of the Attorney General
1366 Dexter Horton Building
Seattle, Washington 98104
(206) 464-7744

PETITION FOR REHEARING IN BANC

Pursuant to Rule 40(a), F.R.A.P., Plaintiffs-Appellants (hereinafter the "States") hereby petition for rehearing of this cause on the grounds that the Panel's decision of July 16, 1982,[1] affirming the rulings of the district court,[2] demonstrably overlooks and misapprehends material points of both law and fact. Moreover, because the Panel's opinion conflicts with other decisions of this Court[3] and the Supreme Court of the United States,[4] the States suggest,

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1 The opinion was written by Judge Aldisert on behalf of himself and Judges Gibbons and Higginbotham.

2 The Honorable Joseph L. McGlynn of the Eastern District of Pennsylvania.

3 Schutte v. Armco Steel Corp. 431 F2d 22 (3rd Cir. 1970), cert. denied, 401 US 910 (1970).

4 Hoffman v. Blaski, 363 US 335 (1960).

pursuant to Rule 35(b), F.R.A.P., that a rehearing in banc is appropriate, inasmuch as consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Circuit.

I.

VENUE
(Opinion, pp. 20-23)

The decision directly conflicts with the Supreme Court's decision in Hoffman v. Blaski, 363 US 335 (1960), and with this Court's previous decision in Schutte v. Armco Steel Corp., 431 F2d 22 (3d Cir. 1970), which itself relied upon Hoffman. Contrary to those decisions, the Panel held that the prerequisite language of 28 USC § 1404(a) - which restricts the transfer of an action to any district "where it might have been

brought" - relates to the time of transfer, rather than to the time an action is commenced. [5] The decision thus conflicts not only with Hoffman[6] and Schutte,[7] but with a multitude of other cases construing the threshold requirement of § 1404(a) in light of Hoffman,[8] and holding that the limiting language relates to the time an action is originally brought, and to the situation existing at that time.[9]

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5 "We agree with the district court that it was not required to confine its venue consideration to the facts as they existed at the time of the complaint. . . . At the time of the transfer to the Eastern District, the action "might have been brought" in that district. Opinion, p. 21.

6 363 US at 342-344.

7 431 F2d at 24.

8 States' reply brief, pp. 3-5.

9 The only decision cited by the Panel in support of its holding is Hess Oil Virgin Islands Corp. v. UOP, Inc., 447 F.Supp. 381 (N.D. Okla. 1978). That decision, however, merely "assumed" that the

Moreover, the decision labors under the misapprehension that by virtue of settlement agreements, the independent merchant defendants, as to whom venue in the Eastern District was not proper, "were no longer in the case,"[10] and "were no longer parties."[11] In fact, however, the settlements with those defendants were only preliminarily approved at the time of transfer, and those defendants were not dismissed until after the trial ended, long after transfer.[12] In addition, the decision

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threshold requirement of § 1404(a) had been met in order to balance the interests of the parties and rule on the motion for transfer, which it ultimately denied. Thus, Hess stands, at best, as uncertain authority for the Panel's marked departure from the mandate of Hoffman and Schutte.

10 Opinion, p. 20.

11 Id., p. 21.

12 States' reply brief, p. 10; App., p. 7138.

affirmed[13] venue as to Butler Paper[14] on the wholly mistaken belief that Butler was "present" in the Eastern District for purposes of venue. That conclusion, however, overlooks entirely the uncontroverted evidence submitted by Butler[15] on that subject,[16] which clearly demonstrates that Butler at no time had any contacts with the Eastern District sufficient to justify venue.

Finally, the District Court "did not state with particularity the reasons underlying its conclusion"[17] as to Butler, or, indeed, as to its other venue conclusions. Its failure to do so conflicts with the guidelines articulated

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13 Opinion, p. 22.
14 App., p. 3878.
15 App., pp. 1537-1542.
16 App., pp. 1509-1523 and 6491-6493.
17 Opinion, p. 22 note 6.

in Schutte that "the entry of an order which does not enunciate sound prerequisite determinations motivating a district judge to order a transfer in any particular litigation renders this court a disservice."[18] The District Court's order on venue articulates no justification for the § 1404(a) transfer.[19]

II.

DIRECTED VERDICT
(Opinion, pp. 25-27)

The decision seriously misapprehends the nature of the State's conspiracy allegations and the evidence presented in

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18 431 F2d at 24. The decision also overturns this Court's "black letter law" that a plaintiff's choice of forum is of paramount importance in the determination of a transfer request. 431 F2d at 25.

19 App., p. 3448-3449.

support of those allegations. It affirms the directed verdict on the basis of those misapprehensions.

Contrary to the Panel's understanding, the States did not allege simply a "higher level"[20] conspiracy. Rather, the States alleged with specificity a conspiracy operating at both the mill level and the merchant level, involving mills, mill-owned merchants, and certain independent merchants.[21] It was precisely that conspiracy upon which evidence was presented at trial. That evidence

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20 Opinion, p. 27.

21 These allegations were set forth both in the States' complaints (App., pp. 116, 197, 211, 222, 254, 274, 331, 342-343, and 371) and in their pretrial memorandum (App., pp. 2467, 2484, 2491, 2563, 2511, 2540, 2552, 2563, 2571, 2578, 2582, and 2585).

included correspondence between a mill-owned merchant and its parent mill regarding an agreement between five mill-owned merchants[22] and two independent merchants[23] to eliminate price discounting;[24] it included announcements from those same merchants announcing their firm pricing decision;[25]

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22 Butler Paper (Great Northern Nekoosa), J.C. Paper (Wausau), Nationwide (Champion International), Seaboard (Mead), and Zellerbach (Crown Zellerbach).

23 Blake, Moffitt and Towne and Carpenter/Offutt.

24 See States' opening brief, pp. 56-57, and Exhibit 560 (App., p. 4966).

25 See States' opening brief, p. 57, and Exhibits 303 (Butler, App., p.4783), 364 (Carpenter/Offutt; App., p. 4460), 365 (Carpenter/Offutt; App., p. 4861), 366 (Butler; App., p. 4863), 367 (Seaboard; App., p. 4864), 368 (Zellerbach; App., p. 4865), 369 (Nationwide; App., p. 4866), 370 (J.C. Paper; App., p. 4867), 371 (Noland; App., p.4868), 373 (Zellerbach; App., p. 4871), and 379 (B, M & T, App., p.4885).

and it included the virtually identical "mark-up" schedules used by three of those mill-owned merchants and two of those independent merchants to compute retail prices.[26]

The Panels' misapprehension of the conspiracy really in issue is demonstrated by the decision's acknowledgement that such evidence was indeed probative of that conspiracy; i.e. one involving independent merchants. Under the mistaken belief that the

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26 See States' opening brief, pp. 57-60, and Exhibits 358 (App., p. 4852), 359 (App., p. 4856), 374 (App., p. 4872), 375 (App., p. 4875) and 376 (App., p. 4879) (B, M & T); 551 (App., p. 4950) and 552 (App., p. 4959) (Butler); 309 (App., p. 4790) (Carpenter/Offutt); 137 (App., p. 4707) (Seaboard); and 342 (App., p. 4823), 355 (App., p. 4834), 356 (App., p. 4837), 357 (App., p. 4846) and 549 (App., p. 4949) (Zellerbach).

conspiracy alleged involved only a "higher level" conspiracy, the decision states that the evidence "at best was probative of an alleged conspiracy unrelated to the conspiracy whose existence was in issue."[27] But the conspiracy actually in issue involved mills, mill-owned merchants and independent merchants, and operated at both the mill and merchant levels, and the decision itself found the evidence presented "probative" of that conspiracy. Thus, there was no danger, as the decision suggests, of "allowing 'mere speculation . . . to do duty for probative facts'."[28]

In addition, the Panel erred in

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27 Opinion, p. 27.
28 Opinion, p. 27.

concluding that the States did not contest Defendants' argument that the excluded evidence pertained only to retail prices, and that they purchased only at bid prices. The States did contest that, and presented evidence that the conspiracy inflated bid prices as well as retail prices, and that the two price levels were related. [29]

Finally, the decision erroneously describes the evidence kept from the jury as "evidence relating to the independent merchants."[30] In fact, as shown above, the evidence related to mill-owned merchants as well as to independent merchants.[31]

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29 See States' reply brief, pp.17-18 (note 42).

30 Opinion, p. 26.

31 See States' opening brief, pp. 55-61.

III.

RULE 33(c) RESPONSE TO INTERROGATORIES
(Opinion, pp. 29-30)

The decision misapprehends or overlooks the circumstances justifying the States' use of Rule 33(c), F.R. Civ. P, in responding to certain Defendants' interrogatories, and the nature of the interrogatories themselves. Moreover, the decision overlooks the very factors and considerations by which the propriety of Rule 33(c) responses are to be determined, and the legal authorities relevant to that determination, including case law which clearly holds that the propounding party has the burden of showing that Rule 33(c) responses are improper. Defendants made no effort whatsoever to carry that burden,[32] and

there is no evidence in the record even remotely supporting the District Court's ruling that the responses were improper. Quite the contrary is true. [33]

As a result of detailed evidentiary submissions in the form of affidavits from the States,[34] which were at no time refuted by Defendants, the record clearly reflects that the precondition to Rule 33(c) recognized by the decision - that "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as

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32 Either before the District Court or in their brief on appeal.

33 States' opening brief, pp. 61-62

34 States' opening brief, pp. 63-64. The Appendix contains affidavits from Alaska (p. 1312); Arkansas (p. 1318); California (p. 1323); Colorado (p. 1328); Iowa (p. 1335); Missouri (p. 1348); Nebraska (p. 1393); Oregon (p. 1404); and Washington (p. 1473).

for the party served" - has been more than adequately met. Accordingly, the District Court's ruling was clearly erroneous, and constituted an abuse of discretion.[35]

IV.

SCHEDULING OF DISCOVERY AND TRIAL
(Opinion, pp. 18-20)

The decision misapprehends or overlooks the overall chronology of discovery and trial preparation, and the specific grounds upon which the States base their argument.[36] Because the decision does not specifically address

35 The decision's citation to Al Barnett & Son v. Outboard Marine Corp., 611 F.2d 32 (3d Cir. 1979) overlooks the fact that in Barnett, there was ample evidence to support the district court's determination. 611 F.2d at 35. Here there was none.

36 States' opening brief, pp. 5-22.

even the major grounds, it is difficult, in the context of this petition, to specify the misapprehensions and oversights in their entirety.

Certain passages of the decision, however, clearly reflect the Panel's misapprehensions. The most noteworthy is the passage that endorses the District Court's comment that the States' requests for additional time were "just constant."[37] That passage alone reflects numerous misinterpretations of the record. First, the States complied with every deadline established by the District Court, although objecting to the deadlines as unrealistic.[38] They filed their first pretrial memorandum on June

37 Opinion, p. 19.
38 App., pp. 4987-4989.

6, 1980, as required, only one week after the close of a frantic effort to complete discovery by the May 30 deadline, and notwithstanding the virtual futility of the brief, since less than half of the deposition transcripts and exhibits had been received from the court reporter.[39] Second, they appeared for trial one week later, as required, anticipating having to proceed with trial, and were the only parties which took the trial setting seriously and made an effort to proceed, notwithstanding the virtual impossibility of doing so in light of the lack of deposition transcripts and exhibits.[40] Third, the States filed their second pretrial memorandum on July 25,[41] as required, and had requested an extension

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39 States' opening brief, pp. 15-16.
40 App. pp. 4987-4989.
41 States' opening brief, p. 19.

of time solely in order to include all evidentiary citations, which they were unable to include on July 25 because they had still not received all deposition transcripts and exhibits from the District Court's court reporter, notwithstanding the District Court's representation in June that the reporter would have such materials to the States a month in advance of the July 25 deadline.[42] To fault the States for complying with deadlines which were simply patently unreasonable and unrealistic in the first instance reflects a serious misapprehension of the record.

The passage of the decision which

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42 States' opening brief, p. 19; App. pp. 4977-4979.

concludes that the District Court was "firm but fair" by deferring trial from January 2 to June 16 to October 6, thus having "accommodated appellants' requests whenever feasible,"[43] overlooks a number of crucial factors. First, the January 2, 1980 trial date was originally established in a total vacuum, at a time when none of the parties were able to provide specific and realistic predictions of the amount of discovery and trial preparation time needed.[44] Indeed, the plaintiffs' coordinated deposition program had not even commenced as of January 21[45] Second, a trial on June 16 would have been impossible in light of the unavailability of the deposition transcripts and exhibits.

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43 Opinion, p. 19.
44 States' opening brief, pp. 5-6.
45 Id, p. 8.

Third, the October 6 date was established on barely a week's notice, after the States' cases had been "back-burnered" by the District Court's decision not to try the cases with the certified plaintiffs in September, and to establish a date for the States' trial "at a later time."[46]

Moreover, the decision conflicts with previous decisions of this Circuit by adopting the strictest standard imaginable for the review of a district

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46 States' opening brief, p. 20. In this regard, the decisions' reliance upon counsel's statement on June 16 that the States would need until September to accomplish myriad pre-trial matters overlooks the fact that at that time it was anticipated that their cases would be tried with the certified plaintiffs in September, and would not be "back-burnered," thus effectively precluding their access to defendants and the court in order to attend to such matters.

court's scheduling of discovery and trial preparation. By requiring "the clearest showing" of "actual and substantial prejudice,"[47] the decision overlooks the lesser standards of Gaspar v. Kassm, 493 F2d 964 (3d Cir. 1974) and Sutherland Paper Co. v. Grant Paper Box Co., 183 F2d 926 (3d Cir. 1950).[48]

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47 Opinion, p. 18.

48 The decision's mere recital that the States reviewed 2 million documents and deposed 270 persons within a fifteen month period ignores the underlying issue, to wit, how effectively and meaningfully were the States able to accomplish those tasks within the time available. Circumstantial evidence of complex antitrust conspiracies is not that easily gathered, and is not that easily reviewed and assimilated for effective and meaningful presentation at trial.

V.

CLASS CERTIFICATION
(Opinion, page 28)

The decision misapprehends the nature of the States' conspiracy allegations and the "commonality" requirement of Rule 23, F.R. Civ. P., and affirms the District Court's denial of class certification on the basis of those misapprehensions, thus perpetuating the District Court's error. The decision refers to a "horizontal conspiracy among the mill defendants" as the "common issue," and identifies as individual issues the "separate proof" required to establish "vertical conspiracies" involving the independent merchants. The misapprehension is twofold.

First, each State alleged a single conspiracy, involving both mills, mill-owned merchants, and a limited number of specified independent merchants.[49] Second, having misapprehended the conspiracy allegations involved, the decision then justifies the denial of classes by misapprehending and misapplying the "commonality" requirement of Rule 23.

The decision erroneously concludes that proof of vertical conspiracies would

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49 Defendants' brief itself is replete with references to the single conspiracy at issue. See pages 27 ("independent merchants . . . participated in a conspiracy with the mill defendants"; "the alleged conspiracy"), 28 ("a national conspiracy including both mills and merchants"; "the alleged conspiracy"), and 29 ("the States' combined horizontal and vertical conspiracy").

vary between class members, depending upon the identity of the merchants from whom they purchased. That conclusion, however, overlooks the fact that the evidence of conspiracy presented by each of the respective States on behalf of its separate class would pertain to the defendants and co-conspirators named and specified in its own case, and would be the same as that presented by the class members themselves, as required by Rule 23. Yet the "commonality" requirement simply requires that common questions of fact (e.g., conspiracy) be established by proof that is common to both the class representative and the class members. It does not require, as this Court's decision and the District Court held, that proof be common as between separate classes represented by different

plaintiffs. "Commonality" is a requirement of Rule 23, requiring a comparison of the proof which would be relied upon by a class representative with the proof relied upon by members of its class if they initiated their own action; it is not a precept of multidistrict litigation, pursuant to which the proof relied upon by a class in one action is compared to that relied upon by another class in another action. To do so is to compare apples with oranges.

Absent the misapprehension that each State's case involves a "horizontal conspiracy" and several "vertical conspiracies," and the misapprehension that the "commonality" requirement of Rule 23 requires a comparison of proof

between separate classes rather than between a class representative and members of its class, it is apparent that the single conspiracy alleged by each State could be established by common proof. There would be no likelihood, as the opinion suggests, of "factual variations among the alleged vertical conspiracies."[50]

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50 The opinion also misapprehends the number of co-conspirators involved in the States' cases. Rather than the "unspecified number" referred to in the decision, the States' trial memorandum specifically identified a total of 31 co-conspirators as to whom evidence would be presented in the consolidated trial of their ten cases, in addition to the named defendants. See App. pp. 2253-2257.

VI.

COLLEGES AND UNIVERSITIES
(Opinion, pp. 30-31)

The decision misapprehends the basis of the District Court's ruling that the States' lacked standing to sue on behalf of their colleges and universities. The decision's reference to a lack of "evidence" from which the District Court could conclude that the States had such standing overlooks the fact that the District Court ruled purely as a matter of law, relying upon the rationale of the district court decision in Fertilizer,[51] a decision since reversed by the Ninth Circuit Court of Appeals.[52]

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51 In re Fertilizer Antitrust Litigation, 1979-2 CCH Trade Cases ¶ 62, 894 (E.D. Wa. 1979); App. p. 4515.

52 State of Alaska v. Chevron Chemical Company, 669 F.2d 1299 (9th Cir. 1982). The Ninth Circuit's

The respective States' standing to sue on behalf of their various colleges and universities stems from the legal relationship between the States and those institutions, and that relationship is created and defined exclusively by state statutes and case law construing those statutes. Those authorities, as well as the Ninth Circuit's decision in Fertilizer, were entirely overlooked by the Panel. The issue was not, as the decision holds, a matter within the District Court's discretion. It was a matter of law,[53] and the Panel's

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decision was cited to the Panel in the States' reply brief at pp. 20-23, and a copy of the decision was appended thereto.

53 Defendants relied upon the district court Fertilizer decision in seeking to have purchases by colleges and universities excluded (App., p. 4501), and themselves characterized the issue as "a question of law" and "a purely legal

decision overlooks all authority relevant to a determination of that issue.

JOHN R. ELLIS
JAMES KIRKHAM JOHNS
Assistant Attorneys General
Office of the Attorney General
1366 Dexter Horton Building
Seattle, Washington 98104
(206) 464-6247

By /s/ James Kirkham Johns
JAMES KIRKHAM JOHNS

On Behalf of Plaintiff-Appellants
Alaska, Arkansas, California,
Colorado, Iowa, Missouri, Montana,
Nebraska, Oregon and Washington
Seattle, Washington 98104

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one" (App., pp. 4502 and 4514).

Statement of Counsel

I hereby express my belief, based on my reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court. Specifically, the panel's decision is contrary to the following cases:

Hoffman v. Blaski, 363 US 335 (1960);
Schutte v. Armco Steel Corp.,
431 F2d 22 (3rd Cir. 1970);
Gaspar v. Kassm, 493 F2d 964
(3rd Cir. 1974); and
Sutherland Paper Co. v. Grant Paper Box Co.,183 F2d 926 (3rd Cir. 1950).

/s/ James Kirkham Johns
JAMES KIRKHAM JOHNS

UNITED STATES COURT OF APPEALS
For The Third Circuit

Nos. 81-2341/42/43/44/45/46/47/48/49/50

In Re: Fine Paper Antitrust Litigation

(D.C. MDL No. 323)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge,
and ALDISERT, ADAMS, GIBBONS, HUNTER,
WEIS, GARTH, HIGGINBOTHAM, SLOVITER
and BECKER, Circuit Judges.

The petition for rehearing filed by
Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Aldisert
Judge

Dated: Aug 12 1982

Office - Supreme Court, U.S.
FILED
DEC 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-829

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF ALASKA, et al.,
Petitioners,

v.

BOISE CASCADE CORP., et al.,
Respondents.

On A Petition For A Writ Of Certiorari To The United States Court of Appeals For the Third Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

H. BLAIR WHITE
(*Counsel of Record*)
NATHAN P. EIMER
DAVID M. SCHIFFMAN
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Respondents

(Additional Counsel listed on inside cover)

REED E. HUNDT
JAMES P. ASPERGER
Latham, Watkins & Hills
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

JOHN P. BORGWARDT
Boise Cascade Corporation
1600 S.W. 4th Avenue
Portland, Oregon 97201
Counsel for Respondent
Boise Cascade Corporation

GORDON B. SPIVACK
NORMAN H. SEIDLER
STEPHEN HOGAN
JAMES R. EISZNER, JR.
Lord, Day & Lord
25 Broadway
New York, New York 10004
Counsel for Respondent
Champion International
Corporation

WILLIAM R. NORFOLK
BRUCE E. CLARK
WILLIAM H. KNULL, III
MARTIN J. CONLON
Sullivan & Cromwell
125 Broad Street
New York, New York 10004
Counsel for Respondent
Crown Zellerbach Corporation

RICHARD K. DECKER
MICHAEL P. COMISKEY
Lord, Bissell & Brook
115 South LaSalle Street
Chicago, Illinois 60603
Counsel for Respondents
Great Northern Nekoosa
Corporation and Butler
Paper Company

HOWARD ADLER, JR.
Bergson, Borkland, Margolis &
Adler
11 DuPont Circle, N.W.
Washington, D.C. 20036
Counsel for Respondent
Hammermill Paper Company

ERWIN C. HEININGER
NED ROBERTSON
JOHN T. HUNDLEY
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604
Counsel for Respondent
International Paper Company

H. BLAIR WHITE
NATHAN P. EIMER
DAVID M. SCHIFFMAN
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
Counsel for Respondent
Kimberly-Clark Corporation

PATRICK W. KITTREDGE
Kittredge, Kaufman & Donley
800 North American Building
121 South Broad Street
Philadelphia, Pennsylvania 19107

HAROLD F. BAKER
ALAN WISEMAN
ROBERT M. BRUSKIN
SCOTT E. FLICK
Howrey & Simon
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Counsel for Respondent
The Mead Corporation

ROBERTS B. OWEN
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

NORMAN M. HEISMAN
JAMES A. CORRODI
Scott Paper Company
Scott Plaza
Philadelphia, Pennsylvania 19113
Counsel for Respondent
Scott Paper Company

STEPHEN C. NEAL
JOEL G. CHEFITZ
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601
Counsel for Respondent
Weyerhaeuser Company

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No. 82-829

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

The petition for a writ of certiorari seeks to overturn a jury verdict for defendants which was reached at the conclusion of a two-month antitrust trial and which was unanimously affirmed by the Court of Appeals. That trial was the culmination of protracted multidistrict litigation. Beginning in 1977, 37 lawsuits were brought in various districts around the country alleging a nationwide conspir-

acy to fix the prices of "fine paper."* (CA-14**). Some of the lawsuits were brought by private parties; others were brought by States, including the ten petitioners herein. All of the cases were consolidated for pretrial proceedings before Judge McGlynn in the Eastern District of Pennsylvania pursuant to the Multidistrict Litigation Act, 28 U.S.C. § 1407.

Each complaint alleged a horizontal price-fixing conspiracy among the manufacturers of fine paper ("mills"). Unlike the other plaintiffs, however, the petitioners also alleged that certain independent distributors of fine paper ("merchants") participated in the conspiracy. The district court had originally planned to sever the claims against the merchants and to try them separately, but the merchants settled with petitioners before trial. (C/A App. 1147-52, 1164-69). In addition, all plaintiffs other than petitioners settled before or during trial.

At the conclusion of the consolidated pretrial proceedings, during which petitioners took some 270 depositions and reviewed nearly two million documents (CA-18), the district court had to decide on trial venue; it could either remand the cases to their various home districts or else transfer them to a single district. Because all of the non-settling respondents were subject to venue in the Eastern District of Pennsylvania, because many of the trial witnesses were located in the district, and because of the obvious advantages of having a consolidated trial before a judge who was already familiar with the litigation, the court decided that all the actions would be tried in the

* The same allegations were also investigated by the Federal Trade Commission and, for two and one-half years, by a federal grand jury. No action was taken by either body. (CA-14).

** The abbreviation "CA" is used to refer to the Court of Appeals decision below. The page numbers refer to the slip opinion, as reproduced in the Appendix to the Petition for Writ of Certiorari.

Eastern District of Pennsylvania "for the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a).

Trial commenced in October 1980, a time that petitioners had proposed. (CA-15). Petitioners introduced the testimony of over 100 witnesses, after which the respondents rested without presenting any evidence. In December 1980, the jury returned a verdict for respondents, finding that there had been no horizontal conspiracy among the mills. The petitioners' allegation of a vertical conspiracy, involving both mills and independent merchants, was not sent to the jury; the court directed a verdict on that subsidiary aspect of the petitioners' case for lack of sufficient probative evidence.

The district court entered judgment on the verdict, and in July 1982 the Court of Appeals unanimously affirmed in all respects. On August 12, 1982, the Third Circuit denied a petition for rehearing in banc.

REASONS WHY CERTIORARI SHOULD BE DENIED

The petition for a writ of certiorari does not present any conflict among the Circuits; it does not raise any substantive issues of antitrust law; and it does not involve any questions of public importance. Petitioners' contentions have been thoroughly reviewed by four judges, and all have agreed that the verdict should be upheld.

I. Because Venue In The Eastern District Of Pennsylvania Was Proper As To Every Respondent Who Went To Trial, The Verdict Should Not Be Overturned Simply Because Other Defendants *Who Had Already Settled* Could Have Objected To The Change Of Venue

Petitioners contend that the jury verdict, rendered after a two-month trial, should be overturned because the trial

was held in the Eastern District of Pennsylvania "for the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). Although venue there was proper as to *every respondent who went to trial*,* petitioners contend that the court was obliged to ignore "the interest of justice" because several of the defendant merchants, *with whom petitioners had already settled*, might have objected to venue in the Eastern District of Pennsylvania. According to petitioners, their ten cases should have been remanded for separate trials in each of their respective home districts.** But this position, if accepted, would lead to "exactly the kind of mischievous consequences against 'the interest of justice' that § 1404(a) was designed to prevent, that is, unnecessary inconvenience and expense to parties, witnesses, and the public." *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19, 21 (1960) (affirming transfer of *in rem* admiralty claim, as well as *in personam* tort claim, even though venue over the *in rem* claim was not proper in the transferee district).

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* Petitioners are apparently still challenging the finding below that respondent Butler Paper Company was subject to venue in the Eastern District of Pennsylvania. (Petition for Writ of Certiorari, p. 35 n.72). The record amply supports that finding. As the Third Circuit pointed out, "there was evidence in the form of an affidavit from an official of defendant Weyerhaeuser Co. that Butler purchased a large amount of paper from a Weyerhaeuser mill in Eastern Pennsylvania, constituting transaction of business sufficient to establish venue . . . under 15 U.S.C. § 22." (CA-22 n.6). See C/A App. 3878.

** Petitioners have also suggested that the ten cases could have been consolidated in the Northern District of California before a judge who would not have had the benefit of Judge McGlynn's experience in handling the litigation for three years. But petitioners have never demonstrated that all of the defendants, including the independent merchants, would have been subject to venue in the Northern District of California. (See C/A App. 1795-1811).

Petitioners argue that 28 U.S.C. § 1404(a), which authorizes "the transfer of any civil action to any other district where it might have been brought," limits venue to those districts where the lawsuit could have been filed against *all* defendants who were originally sued, including defendants who have already settled or been dismissed. This position, however, has never been accepted by any court.* The generally recognized interpretation of § 1404(a) is that the propriety of a change of venue depends on the parties *who will appear at trial*, not those who were originally sued. For example, when a change of venue is found to be desirable, but the transfer is impermissible as to some defendants, the courts have not hesitated to order separate trials and to transfer one of the trials to the more convenient district.** Indeed, in this very case, the district court had initially planned to have separate trials—one against the mills, the other against the independent merchants. (C/A App. 1147-52, 1164-69). Had the litigation been thus severed, the trial against the mills (respondents) unquestionably could have been transferred to the Eastern District of Pennsylvania. Petitioners ultimately chose to settle with the independent merchants, and consequently there was no need to sever. But, as the Third Circuit explained, that does not affect the validity of the transfer:

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* *See, e.g., Hess Oil Virgin Islands Corp.* v. *UOP, Inc.*, 447 F.Supp. 381 (N.D. Okla. 1978) (plaintiff allowed to seek change of venue after settling with one defendant who could not have been sued in transferee district); *Ackert* v. *Ausman*, 198 F.Supp. 538 (S.D.N.Y. 1961), *mandamus denied sub nom. Ackert* v. *Bryan*, 299 F.2d 65 (2d Cir. 1962) (in granting change of venue, court only considered defendants who had not been dismissed).

** *See, e.g., Wyndham Associates* v. *Bintliff*, 398 F.2d 614, 618 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968); *Anrig* v. *Ringsby United*, 603 F.2d 1319, 1324 (9th Cir. 1978); 15 C. Wright, A Miller & E. Cooper, *Federal Practice & Procedure* § 3845 at 225-26 (1976) (collecting cases).

> "Just as venue defects as to a party whose portion of the action has been severed do not bar transfer of the remainder of the action, . . . a party's settlement of his portion of the action cures any objection to venue in the transferee district with respect to that party." (CA-21) (citations omitted).

Petitioners have offered no good reason for prohibiting an advantageous change of venue—one that promotes "convenience" and "the interest of justice"— merely because defendants who are no longer in the case might have objected to the change. Petitioners assert that Congress intended for venue to be fixed early in the litigation. But that is not the procedure Congress has decreed for multidistrict litigation. The Multidistrict Litigation Act, 28 U.S.C. § 1407, provides that normal venue rules do not apply to "pretrial proceedings."* Only when "all common discovery and other pretrial proceedings have been completed" does the district court decide on trial venue.** By that time, many of the original parties may have settled or been dismissed, and it would defeat the objectives of both § 1404(a) and § 1407 to ignore these developments and remand to an inconvenient forum because of venue considerations relevant only to defendants who are no longer parties. Trial venue affects the litigants who are going to trial, not parties who have settled since being named in the original complaint.

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* Pretrial proceedings can be transferred by the Judicial Panel on Multidistrict Litigation "to any district . . . for the convenience of parties and witnesses" if the transfer "will promote the just and efficient conduct of such actions." § 1407(a). Such a finding was made below. *In re Fine Paper Antitrust Litigation*, 446 F.Supp. 759, 760 (J.P.M.L. 1978); *In re "Fine Paper" Antitrust Litigation*, 453 F.Supp. 118 (J.P.M.L. 1978).

** Rule 11(b), 11(d), Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 28 U.S.C.A. § 1407.

Petitioners rely on *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), but that case has never been interpreted to preclude a change of venue that is proper as to every party going to trial. *Hoffman* held that a defendant cannot, by waiving his venue rights, *unilaterally* expand the range of permissible venues by seeking a § 1404(a) transfer to a district in which plaintiff had no right to bring the suit. "We do not think the phrase 'where it might have been brought' can be interpreted to mean . . . 'where it may now be rebrought, with defendants' consent.'" 363 U.S. at 342-43. In the present case, however, the claims that petitioners took to trial against respondents *could* have been brought in the Eastern District of Pennsylvania; respondents' consent was not required.*

Unlike the interpretation of § 1404(a) that was rejected in *Hoffman* v. *Blaski* as "discriminatory," the interpretation used below treats plaintiffs and defendants equally. If new venues become available as a result of settlements, any party can seek a transfer.** Because the rule followed by the

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* Petitioners contend that *Hoffman* requires the court to examine "the situation which existed when suit was instituted." 363 U.S. at 343. This passage refers to the possibility that, after suit is filed, "the defendants may move their residence . . . [or] begin the transaction of business in some other district." 363 U.S. at 342. That is not the situation here. Each of the respondents was subject to venue in the Eastern District of Pennsylvania *at the time suit was filed.*

** Indeed, as this case demonstrates, the ability to expand the range of permissible venues through settlements rests with the *plaintiffs*. *See also Hess Oil Virgin Islands Corp.* v. *UOP, Inc.*, 447 F.Supp. 381 (N.D. Okla. 1978) (plaintiff brought suit in the only district where all defendants could be sued; then, after settling with one defendant, plaintiff was allowed to seek a change of venue).

district court and the court of appeals is even-handed and sensible, and because no court has ever held to the contrary, certiorari should be denied.

II. Petitioners Were Allowed Sufficient Time To Prepare For Trial

Petitioners contend that the district court abused its discretion in scheduling discovery and setting the trial date. But petitioners were allowed time to take some 270 depositions, and the case went to trial on a date that petitioners had originally proposed. (CA-15, 18). No avenues of discovery were closed to petitioners, and no reason has been given why they could not meet the court's deadlines. Petitioners have utterly failed to meet their burden of demonstrating "actual and substantial prejudice" as a result of the district judge's actions.* The Court of Appeals examined petitioners' complaints carefully, and concluded:

> "After considering all of appellants' contentions and examining the 16-volume appendix they have supplied to this court, we are not persuaded that the pretrial rulings of the district court prejudiced the preparation or presentation of their case. . . . Our independent review of the record persuades us that the trial court in this case was firm but fair. It deferred the trial date from January 2 to June 16 to October 6, 1980, and it accommodated appellants' requests whenever feasible." (CA-18-19).

Much of petitioners' complaint relates to discovery deadlines *that were subsequently postponed at petitioners' request*. The trial judge allowed discovery on the merits to commence in February 1979 and initially scheduled trial for

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* CA-18, *quoting Eli Lilly & Co.* v. *Generix Drug Sales, Inc.*, 460 F.2d 1096, 1105 (5th Cir. 1972).

Petitioners do not dispute that this is the proper standard of review.

January 1980. (C/A App. 866). In the face of this trial date, petitioners' only discovery consisted of document requests and interrogatories. When they requested more time for discovery in January 1980, the trial date was put off and a May 30th discovery cut-off date was set. When petitioners failed to complete discovery by that deadline—a deadline that all of the private plaintiffs were able to meet—the court allowed petitioners to take still more depositions. In sum, petitioners had ample opportunity to take necessary discovery.

Petitioners' complaint about the trial date is equally unfounded. The trial began in October 1980, a time that petitioners had originally proposed. (CA-15). Although the court initially set the trial for January 2, 1980, at petitioners' request the district court "deferred the trial date . . . to June 16 [and then] to October 6." (CA-19). Petitioners' counsel stated in June that he could "accomplish everything" by September 1. (CA-18 n.4). Clearly, therefore, the district judge did not abuse his discretion by commencing trial on October 6.

III. Petitioners' Other Challenges Are Without Merit

Petitioners were allowed to go to the jury on their principal allegation that there was a nationwide price-fixing conspiracy involving fine paper manufacturers ("mills"). The jury found that no such conspiracy existed. Petitioners also alleged a broader national conspiracy involving *both* mills *and* independent "merchants" (*i.e.*, distributors). The district court directed a verdict on this aspect of the case, finding that petitioners had failed to present sufficient probative evidence of such a conspiracy. On appeal, petitioners argued that the district court had not given them the full benefit of their evidence, but the Third Circuit disagreed:

> "Plaintiffs alleged a nationwide conspiracy between mills and independent merchants. Viewed in the light most favorable to appellants, the evidence upon which they rely in their challenge to the directed verdict *involves only communication among merchants relating to retail prices.* Like the district court, we will not permit the jury to infer from communication at a lower level the existence of a conspiracy at a higher level . . . [T]he court refused to submit to the jury evidence which at best was probative of an alleged conspiracy *unrelated to the conspiracy whose existence was at issue.*" (CA-27) (emphasis added).

Petitioners now ask this Court to sift through the evidence and determine whether the partial directed verdict was warranted. Yet, as the Third Circuit pointed out, the only evidence offered to show a nationwide conspiracy among mills and merchants involved communications by *merchants* relating to the *retail prices* charged by merchants, not the wholesale prices charged by the mills, or the bid prices paid by the petitioners. (CA-27). Petitioners place special emphasis on a letter sent to one mill by its wholly-owned subsidiary. That letter only referred to retail prices charged by merchants and it did not mention, either directly or indirectly, any of the other defendant mills or the prices they charged.* Four judges have reviewed this evidence; all have concluded that it was insufficient to support a finding that there was a nationwide conspiracy among mills and merchants, a conclusion that is consistent with the jury's finding that there was no conspiracy among mills.

In any event, as the Court of Appeals pointed out, the petitioners were not prejudiced by this ruling because they

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* Because there was no evidence to connect this isolated event to the alleged nationwide conspiracy, the Third Circuit found it "unrelated to the conspiracy whose existence was in issue," and therefore concluded that petitioners' reliance on *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962), was misplaced. (CA-26-27).

never paid the retail prices that were allegedly fixed by the merchants.* "Appellants purchased paper not at retail but only on the basis of bids. We do not perceive any prejudice resulting from the entry of the [partial] directed verdict." (CA-27). Because the defendant mills did not sell at retail and the plaintiff States did not pay retail prices, petitioners had no right to go to the jury with evidence relating solely to an alleged conspiracy to fix retail prices.**

Petitioners also challenge the denial of class certification and, with respect to one petitioner, the exclusion of certain damage evidence as a sanction for disobeying a discovery order. Neither challenge goes to the validity of the verdict, and both are thoroughly answered in the Third Circuit's opinion. (CA-28-31).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

H. BLAIR WHITE
(Counsel of Record)
NATHAN P. EIMER
DAVID M. SCHIFFMAN
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for Respondents

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* Petitioners did not purchase fine paper from the mills; they only purchased from merchants.

** Petitioners also assert that the district court excluded certain documents as a result of the directed verdict. *But petitioners made no record of any documents being excluded from evidence on that basis.*

REED E. HUNDT
JAMES P. ASPERGER
Latham, Watkins & Hills
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

JOHN P. BORGWARDT
Boise Cascade Corporation
1600 S.W. 4th Avenue
Portland, Oregon 97201
Counsel for Respondent
Boise Cascade Corporation

GORDON B. SPIVACK
NORMAN H. SEIDLER
STEPHEN HOGAN
JAMES R. EISZNER, JR.
Lord, Day & Lord
25 Broadway
New York, New York 10004
Counsel for Respondent
Champion International
Corporation

WILLIAM R. NORFOLK
BRUCE E. CLARK
WILLIAM H. KNULL, III
MARTIN J. CONLON
Sullivan & Cromwell
125 Broad Street
New York, New York 10004
Counsel for Respondent
Crown Zellerbach Corporation

RICHARD K. DECKER
MICHAEL P. COMISKEY
Lord, Bissell & Brook
115 South LaSalle Street
Chicago, Illinois 60603
Counsel for Respondents
Great Northern Nekoosa
Corporation and Butler
Paper Company

HOWARD ADLER, JR.
Bergson, Borkland, Margolis &
Adler
11 DuPont Circle, N.W.
Washington, D.C. 20036
Counsel for Respondent
Hammermill Paper Company

ERWIN C. HEININGER
NED ROBERTSON
JOHN T. HUNDLEY
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604
Counsel for Respondent
International Paper Company

H. BLAIR WHITE
NATHAN P. EIMER
DAVID M. SCHIFFMAN
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
Counsel for Respondent
Kimberly-Clark Corporation

PATRICK W. KITTREDGE
Kittredge, Kaufman & Donley
800 North American Building
121 South Broad Street
Philadelphia, Pennsylvania 19107

HAROLD F. BAKER
ALAN WISEMAN
ROBERT M. BRUSKIN
SCOTT E. FLICK
Howrey & Simon
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Counsel for Respondent
The Mead Corporation

ROBERTS B. OWEN
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

NORMAN M. HEISMAN
JAMES A. CORRODI
Scott Paper Company
Scott Plaza
Philadelphia, Pennsylvania 19113
Counsel for Respondent
Scott Paper Company

STEPHEN C. NEAL
JOEL G. CHEFITZ
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601
Counsel for Respondent
Weyerhaeuser Company

APPENDIX: RULE 28.1 LISTING

Pursuant to Supreme Court Rule 28.1, respondents submit the following list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of respondents. In accordance with the instructions of the Clerk, only public-traded corporations are listed. Some of the corporations listed below may not be "affiliates" or, in the case of some foreign corporations, they may not be "publicly held," as those terms are used by the Securities and Exchange Commission.

Boise Cascade Corporation

None

Butler Paper Company

Great Northern Nekoosa Corporation

Champion International Corporation

Weldwood of Canada Ltd.

Crown Zellerbach Corporation

Crown Zellerbach Canada Ltd.

Great Northern Nekoosa Corporation

None

Hammermill Paper Company

Gulf & Western Industries, Inc.

International Paper Company

None

Kimberly-Clark Corporation

Kimberly-Clark de Mexico, S.A. de C.V.
Carlton Paper Corporation Ltd.

The Mead Corporation

British Columbia Forest Products Limited

Scott Paper Company

Scott Paper Limited
Cia. Industrial de San Cristobal, S.A.
Papelas Scott de Columbia, S.A.
Celulosa Jujuy, S.A.
Gureola-Scott, S.A.
Brascan Limited

Weyerhaeuser Company

None

Supreme Court, U.S.
FILED
JAN 13 1983
ALEXANDER L. STEVAS
CLERK

No. 82 - 829

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1982

In Re: Fine Paper Antitrust Litigation
MDL 323

STATE OF ALASKA, et al,

Petitioners,

v.

BOISE CASCADE, et al,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For the Third Circuit

PETITIONER'S REPLY BRIEF

JOHN R. ELLIS
Senior Assistant Attorney General
JAMES KIRKHAM JOHNS *
Assistant Attorney General
Office of the Attorney General
1366 Dexter Horton Building
Seattle, Washington 98104
(206) 464-6247

* Counsel of Record

On Behalf Of Petitioners

[Additional Counsel
Listed Inside]

State of Alaska:
Louise E. Ma, Esq.
Office of the Attorney General
1031 W. 4th Ave., Suite 200
Anchorage, AK 99501
(907) 276-3550

State of Arkansas:
Jeffrey A. Bell, Esq.
Antitrust Division
Office of the Attorney General
Justice Building
Little Rock, AR 972201
(501) 371-1092

State of California:
Patricia A. Cutler, Esq.
Charles M. Kagay, Esq.
Department of Justice
6000 State Office Building
350 McAllister Stree
San Francisco, CA 94102
(415) 557-3651

State of Colorado:
Thomas P. McMahon, Esq.
Office of the Attorney General
Antitrust Unit
Enforcement Section
Department of Law, Third Floor
1525 Sherman Street
Denver, CO 80203
(303) 866-3611

State of Iowa:
John R. Perkins, Esq.
Antitrust Division
Department of Justice
Second Floor
Hoover State Office Building
Des Moines, IA 50319
(515) 281-6701

State of Missouri:
Robert Dolan, Esq.
Office of the Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321

State of Montana:
Jerome J. Cate, Esq.
Antitrust Enforcement Bureau
Office of the Attorney General
State Capitol
Helena, MT 59601
(406) 449-2026

State of Nebraska:
Dale A. Comer, Esq.
Department of Justice
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682

State of Oregon:
Richard L. Caswell, Esq.
Antitrust Division
Department of Justice
235 Union Street, Northeast
Salem, OR 97310
(503) 378-4732

State of Washington:
John R. Ellis, Esq.
James Kirkham Johns, Esq.
Office of the Attorney General
1366 Dexter Horton Building
Seattle, Washington 98104
(206) 464-7744

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PETITIONER'S REPLY BRIEF

I.
INTRODUCTION

Petitioners submit this reply for the limited purpose of correcting Respondents' distortion of the record on two matters pertaining to the scheduling of discovery and trial and to the partial directed verdict. With respect to both, Respondents have perpetuated the court of appeals' misapprehension of the record, and have disregarded both the record and Petitioners' efforts to correct the court of appeals' misapprehension in their petition for rehearing.[1]

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1 At A62 and A53-A54.

II.
SCHEDULING OF DISCOVERY AND TRIAL
(Petition, pp. 9-20, 42-53)

Respondents argue[2] that Petitioners have no cause to complain of the ultimate October, 1980 trial setting, inasmuch as Petitioners stated during the June 16 pre-trial conference[3] that they would need until September "to accomplish everything", i.e. the completion of myriad pre-trial matters, including the receipt, review and analysis of over 100 deposition transcripts not yet available from the court reporter,[4] the preparation of the second pre-trial memorandum required by the district court, and the designation and counter-designation of deposition testimony and exhibits to be used at trial, and the resolution, by negotiation

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2 Respondents' Brief, p. 9.
3 C/A App. pp. 2068-2072 (Tr. June 16, 1980 Hrg., pp. 46-50).
4 Petition, pp. 15-17.

or court ruling, of evidentiary objections with respect thereto, all of which would have made an orderly and effective presentation at trial possible. As the record clearly reflects,[5] however, Petitioners' reference to September at that time was based on the expectation that their cases would be tried with the cases of the Certified Plaintiffs and the Minority States in late September. The reference to September became meaningless, however, once Petitioners' cases were effectively "back-burnered" by the district court's decision not to try the cases together in September, as contemplated in June,[6] but rather to determine a date for Petitioners' trial "at a later time."[7]

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5 C/A App. pp. 2068-2072 (Tr. June 16, 1980 Hrg., pp. 46-50) and 2092-2093 (Tr. June 16, 1980 Hrg., pp. 88-89).

6 C/A App. pp. 2092-2093 (Tr. June 16, 1980 Hrg., pp. 88-89).

7 C/A App. pp. 4982-4983 (July 30,

That decision by the district court effectively precluded Petitioners from meaningful access to Respondents and the court, who were then focusing their attention on the trial of the Certified Plaintiffs and Minority States, to attend to the pre-trial matters referred to by Petitioners in June. Petitioners' ability to accomplish those matters was thus abruptly halted - to be suddenly set in motion by the district court's later scheduling of an October trial on barely a week's notice.[8]

1980 letter from the Honorable Joseph L. McGlynn, Jr. to Harold E. Kohn (liaison counsel for Certified Plaintiffs) and Patrick W. Kittredge (liaison counsel for Respondents), with a carbon copy to James Kirkham Johns (liaison counsel for Petitioners).

8 Petition, p. 18.

III.
PARTIAL DIRECTED VERDICT
(Petition, pp. 22-26,53-55)

Respondents argue[9] that Petitioners were not prejudiced by the district court's partial directed verdict because Petitioners never paid the retail prices fixed by the merchants and Respondents, inasmuch as they purchased at bid prices. The record, however, contains evidence not only of purchases at the very retail prices fixed by the merchants and Respondents, but in addition, an economist's testimony establishing that bid prices were related to the retail price level fixed by the merchants and Respondents.[10]

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9 Respondents' Brief, pp. 10-11.

10 Petitioners' second pretrial memorandum, ¶ ¶ 8-21, 27, 33-36, 47, and 65 (regarding impact and damages) at C/A App. pp. 2440-2602, 2620-2643, 2674-2718, 2792-2796, 3204-3223, 3230-3241, 3490-3554, 3567-3571, 3590-3597, 3622-3623, 3754-3757, 3761-3766; Trial Transcript, Volume 27, pp.

IV.
CONCUSION

Petitioners respectfully submit that the Petition For Writ Of Certiorari should be granted.

DATED: January 12, 1983.

Respectfully submitted,

JOHN R. ELLIS
Senior Assistant Attorney General

JAMES KIRKHAM JOHNS *
Assistant Attorney General
Office of the Attorney General
1366 Dexter Horton Building
Seattle, Washington 98104

* Counsel of Record

On Behalf Of Petitioners

27.48-27.147 at C/A App. pp. 7024-7120 (specifically, C/A App. pp. 7027-7028, 7030-7032, and 7056-7118).